In the

United States Court of Appeals

For the Seventh Circuit

No. 11743

CLAIRON VERN GIBSON,
Plaintiff-Appellant,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

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1 UNITED STATES DISTRICT COURT,

Northern District of Indiana,

Hammond Division.

Pleas and Proceedings had in the United States District Court for the Northern District of Indiana, Hammond Division, in the matter of:

Clairon Vern Gibson
vs.
Elgin, Joliet and Eastern Railway Company } Hammond Civil 1466.

Be It Remembered that heretofore on the 16th day of April, 1953 the plaintiff in the above entitled cause of action, filed a complaint in the office of the Clerk, which complaint reads in the words and figures following, to wit:

• • • • •

3 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Indiana,

Hammond Division.

Clairon Vern Gibson,
Plaintiff,
vs.
Elgin, Joliet & Eastern Railway Company,
Defendant. } Civil Action No. 1466.

COMPLAINT FOR DAMAGES.

(Filed Apr. 16, 1953. Kenneth Lackey, Clerk.)

1.

Plaintiff complains of the defendant, Elgin, Joliet & Eastern Railway Company and for cause of action alleges and says:

That plaintiff is a resident and citizen of the City of

Gary, County of Lake and State of Indiana, which is in the Hammond Division of the Northern District of Indiana, and that the defendant is a corporation, incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2.

That in addition to the diversity of citizenship of the parties herein, jurisdiction is also conferred upon this court by the Federal Employer's Liability Act, 45 U.S.C.A., Section 51, et seq.

3.

That during the times herein mentioned the defendant owned and operated in interstate commerce, numerous railroad trains; that in connection therewith, the said defendant operated switchyards, roundhouses, timekeepers' buildings and other buildings, all designed as Kirk Yard, in the City of Gary, Lake County, State of Indiana.

4.

That on or about the 13th day of December, 1951, this plaintiff was employed as a timekeeper by the defendant corporation and had been so employed for a period of time prior thereto.

5.

That as such timekeeper the plaintiff worked in and out of what was known as Supervisor and Timekeeper building #100 in Kirk Yard.

6.

That plaintiff's duties consisted of getting out the time rolls, checking men on the job; making up necessary
4 employment papers and work slips, reporting all accidents and derailments and numerous other duties all connected with interstate commerce.

7.

That at said time plaintiff worked in timekeepers' building #100 along with several other employees.

8.

That the room in which plaintiff worked was a small room crowded with 4 desks, chairs, cabinets, lockers, wastepaper baskets and spittoons; that two desks were placed back to back; that the plaintiff used one of said desks; that plaintiff used a swivel chair at his desk; that when plaintiff sat at his desk his back was to the wall.

9.

That plaintiff in working at his desk was cramped for room, there being only about 3 feet between his desk and the wall in back of him; that numerous iron pipes ran along the wall next to his desk; that a filing cabinet and metal wastepaper basket crowded the space in which he was to work.

10.

That at said time the room was poorly lighted by two 50-watt bulbs, resulting in poor visibility.

11.

That at said time this plaintiff, as timekeeper, had an additional load of work placed upon him due to the increased number of workers used in constructing what was known as "The Hump" track at Kirk Yard.

12.

That during the time the plaintiff was timekeeper, a large number of men would report, and check into their small timekeepers' shelter known as Building #100; that many of these men would come in off the job with shovels; that after coming into the timekeepers' shanty they would leave a deposit of cinders, gravel, pebbles and grease and snow upon the bare floor.

13.

That numerous employees congregated in said Shanty #100 during the morning and noon hours; that said men would bring in dirt and grease upon their shoes; that said men would indulge in various games and horseplay, and would not let the office equipment alone; that to safeguard the adding machines which did not belong to the

defendant company, it was necessary to store said machines out of the way, and out of sight.

14.

That no foot scraper or mat was placed at or near the door for their convenience in keeping the interior of the timekeepers' shanty #100, clean.

5 15.

That the defendant company failed to keep the timekeepers' shanty clean of any of the aforementioned foreign materials.

16.

That due to the large number of men employed on "The Hump," and surrounding yards, the plaintiff required and requested additional help so that the work could be gotten out in time; that the defendant refused and failed to provide for any additional help to the aforesaid timekeepers working in Shanty #100.

17.

That the plaintiff required and requested additional equipment such as adding machines, so that the work could be gotten out in time, but this was refused.

18.

That it was necessary for this plaintiff to work long hours of overtime, trying to get out the payroll sheets in time.

19.

That in trying to get out the payroll sheets the plaintiff furnished his own portable adding machine from his home, to assist him in his tabulating.

20.

That on or about December 13, 1951, plaintiff was working overtime and at approximately 9:00 P. M., plaintiff was placing a portable adding machine under his desk; that at said time the room was poorly lighted; that the floor was dirty after a number of days' accumulation of cinders, gravel, pebbles and grease.

21.

That when plaintiff stooped down under his desk to put the adding machine away, he was working in close, crowded, cramped and badly lighted quarters.

22.

That when the plaintiff started back from under his desk his foot slipped and gave way on some of the gravel, pebbles, cinders and grease on the floor; that in attempting to catch his balance his head came up suddenly and hit the bottom edge of the desk drawer with great force.

23.

That as a result of the aforementioned blow and accident, this plaintiff sustained and suffered a concussion to the brain which caused and resulted in a left subdural hydroma of the brain. That shortly thereafter plaintiff suffered severe headaches; that subsequent to said blow, the right side of plaintiff's body became progressively weaker and became totally paralyzed.

24.

That as a result of the blow to his head and injury to his brain, plaintiff received medical treatment as follows: that an operation on the brain was performed to relieve the pressure; that it was necessary to remove some of the membrane; that as a result the plaintiff is now permanently disabled in this, that he has weakness and paralysis in his right arm and hand; that his right leg is weaker, and partially paralyzed; that now he has a permanent limp and drag to his right leg and side.

25.

That prior to the accident and injuries, which the plaintiff sustained, he was ablebodied and in good health and possessed a healthy, normal, nervous system; that since said injuries his physical condition has been permanently damaged and impaired.

26.

That at said time plaintiff was 47 years of age.

27.

That the proximate cause of the injuries and damage to this plaintiff was the negligence of the defendant, to-wit:

(1) The defendant failed to furnish the plaintiff a reasonably safe place and surroundings in which to work and perform his duties;

(2) The defendant failed to furnish any foot mat or foot scraper at the door of Shanty #100.

(3) The defendant permitted pebbles, cinders, gravel and grease to accumulate on the bare floor of Shanty #100.

(4) Defendant ordered the plaintiff to work in crowded and cramped quarters.

(5) Defendant failed to keep and maintain the floor of Shanty #100 in a clean condition.

(6) Defendant failed to inspect the premises of Shanty #100.

(7) Defendant failed to give and furnish sufficient help to assist the plaintiff as timekeeper, necessitating long, arduous hours of employment under conditions existing as heretofore mentioned, in Shanty #100.

(8) Defendant failed to furnish and maintain sufficient and adequate lighting facilities in Shanty #100.

(9) Defendant failed to furnish necessary adding machines or computing appliances.

(10) Defendant failed to furnish sufficient working space.

(11) Defendant permitted numerous employees to congregate in said Shanty #100.

(12) Defendant failed to place any sign reading "No Loitering" in Shanty #100.

(13) Defendant failed to furnish this plaintiff with a safe place where his adding machine could be placed for safekeeping.

(14) Defendant employer failed to use reasonable care in furnishing the plaintiff a safe place in which to work.

28.

That prior to his injuries plaintiff was capable of earning and did actually earn $14.69 per day. By these injuries the plaintiff has been made incapable of any gainful
7 activity or employment and has suffered great physical mental pain and anguish, and has incurred expense in

the amount of $1425.00 for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against the defendant, the Elgin, Joliet and Eastern Railway Company in the sum of One Hundred Fifty Thousand Dollars ($150,000.00), plus Court costs and all other just and proper relief.

s/ Justin Waitkus,
of Sackett, Pyatt & Waitkus,
Attorneys for Plaintiff,
569 Broadway,
Gary, Indiana,
Telephone 7678.

• • • • •

9 And afterwards, to wit, on the 16th day of June, 1953, the following proceedings were had, to wit:

Comes now the defendant, Elgin, Joliet and Eastern Railway Company and files answer, which answer reads in the words and figures following, to wit:

10 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1466) • •

ANSWER.

(Filed June 16, 1953. Kenneth Lackey, Clerk.)

Now comes the defendant, Elgin, Joliet and Eastern Railway Company, by its attorneys, and for answer to plaintiff's complaint says:

First Defense.

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense.

1. Defendant alleges that it is a corporation organized and existing under the laws of the States of Illinois and Indiana, and for purposes of the jurisdiction of this Court, defendant is a citizen and resident of the State of Indiana. Defendant admits the remaining allegations of paragraph 1.

2. Defendant denies that there is any diversity of citizenship between the plaintiff and the defendant. Defendant admits that plaintiff's complaint purports to be brought under the Federal Employers' Liability Act, but defendant denies that plaintiff has any right of action under said statute.

3. Defendant admits the allegations of paragraph 3.

4. Defendant admits the allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that any of plaintiff's duties as timekeeper, at the time and place referred to in plaintiff's complaint, were in furtherance of inter-state commerce, or directly or closely and substantially affected inter-state commerce. Defendant denies that plaintiff had any duties in connection with reporting of accidents and derailments.

7. Defendant admits the allegations of paragraph 7.

11 8. Defendant admits that in the performance of his work plaintiff used one of two desks placed back to back and a swivel chair so placed that his back was to the wall. Defendant denies that the room in which plaintiff worked was crowded as alleged in paragraph 8.

9. Defendant admits that there was approximately three feet between plaintiff's desk and the wall behind him and that several iron pipes ran along the wall beside his desk. Defendant denies the remaining allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10.

11. Defendant denies the allegations of paragraph 11.

12. Defendant denies the allegations of paragraph 12.

13. Defendant denies the allegations of paragraph 13.

14. Defendant denies the allegations of paragraph 14.

15. Defendant denies the allegations of paragraph 15.

16. Defendant denies the allegations of paragraph 16, and denies that any additional help was necessary in order to enable plaintiff to perform his duties.

17. Defendant denies the allegations of paragraph 17 and denies that any additional equipment was necessary to enable plaintiff to perform his duties.

18. Defendant denies the allegations of paragraph 18.

19. Defendant denies the allegations of paragraph 19.

20. Defendant denies the allegations of paragraph 20.

21. Defendant denies the allegations of paragraph 21.

22. Defendant denies the allegations of paragraph 22.

23. Defendant denies the allegations of paragraph 23.
24. Defendant denies the allegations of paragraph 24.
25. Defendant denies the allegations of paragraph 25.
26. Defendant admits the allegations of paragraph 26.
27. Defendant denies the allegations of paragraph 27.
28. Defendant denies the allegations of paragraph 28.

12

Third Defense.

1. Defendant alleges that the plaintiff is a citizen and resident of the State of Indiana, and that for purposes of the jurisdiction of this Court, defendant is a corporation organized and existing under and by virtue of the laws of the State of Indiana, and is a citizen and resident of the State of Indiana. Defendant denies that jurisdiction of this Court arises by virtue of diversity of citizenship of the parties.

2. Defendant denies that at the time and place referred to in plaintiff's complaint any part of plaintiff's duties was in furtherance of inter-state commerce, or directly or closely and substantially affected inter-state commerce. Defendant denies that jurisdiction of this Court arises under the Federal Employers' Liability Act.

Wherefore, defendant prays that this action be dismissed for want of jurisdiction of this Court.

Fourth Defense.

Defendant alleges that any injuries alleged to have been sustained by the plaintiff were caused solely and proximately, or in the alternative, were contributed to by the negligence of the plaintiff.

Fifth Defense.

Defendant alleges that any injuries alleged to have been sustained by the plaintiff were caused solely and proximately by the conduct of the plaintiff and not by any act of negligence, or otherwise, whether of omission or commission, of any employees of the defendant other than the plaintiff.

Sixth Defense.

Defendant alleges that plaintiff's physical condition was not the result of the occurrence referred to in plaintiff's complaint, but is the normal development of conditions not related to or arising from plaintiff's employment by the defendant.

/s/ Glenn D. Peters,
5246 Hohman,
Hammond, Indiana,
/s/ Harlan L. Hackbert,
208 So. La Salle Street,
Chicago, Illinois.

Peters & Highland,
Knapp, Cushing, Hershberger and Stevenson,
Of Counsel.

* * * * *

14 And afterwards, towit, on the 26th day of September, 1955, the following proceedings were had, towit:

Come now the parties and trial of this case is resumed and plaintiff submits further evidence, concludes and rests. And now at close of plaintiff's evidence, defendant files motion for directed verdict which motion is overruled with reservations and which motion reads in the words and figures following, towit:

15 In the District Court of the United States.
* * (Caption—1466) * *

MOTION FOR DIRECTED VERDICT.

(Filed Sept. 26, 1955. Kenneth Lackey, Clerk.)

Comes now the defendant, at the close of the plaintiff's evidence in chief, and now moves the Court to direct the jury to return a verdict for the defendant, for each of the following separate and several reasons:

a. There is no evidence here from which the jury may find that the defendant was, at the time of his claimed injuries engaged in any activity within The Federal Employers Liability Act, 45 U. S. C. A. Section 51, et seq.

b. There is no evidence in this cause from which the jury may infer that any negligent act of the defendant proximately caused any injury or injuries to the plaintiff in whole or in part.

c. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish the plaintiff a reasonably safe place and surroundings in which to work and perform his duties.

d. There is no evidence in this cause from which the jury may infer that the defendant negligently permitted pebbles, cinders, gravel and grease to accumulate on the bare floor of Shanty #100.

e. There is no evidence in this cause from which the jury may infer that the defendant negligently ordered the plaintiff to work in crowded and cramped quarters.

f. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to keep and maintain the floor of Shanty #100 in a clean condition.

g. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to inspect the premises of Shanty #100.

h. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to give and furnish sufficient help to assist the plaintiff as timekeeper, necessitating long, arduous hours of employment under conditions existing as heretofore mentioned, in Shanty #100.

16 i. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish and maintain sufficient and adequate lighting facilities in Shanty #100.

j. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish necessary adding machines or computing appliances.

k. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish sufficient working space.

l. There is no evidence in this cause from which the jury may infer that the defendant negligently permitted numerous employees to congregate in said Shanty #100.

m. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to place any sign reading "No Loitering" in Shanty #100.

n. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish this plaintiff with a safe place where his adding machine could be placed for safekeeping.

o. There is no evidence in this cause from which the jury may infer that the defendant employer negligently failed to use reasonable care in furnishing the plaintiff a safe place in which to work.

p. There is no evidence in this cause from which the jury may infer that the injuries which plaintiff claims was proximately caused by any act or omission of the defendant.

q. The evidence in this cause conclusively points to the fact that the sole proximate cause of plaintiff's injuries was his own act or acts.

r. There is no evidence in this cause from which the jury may infer any duty on the part of the defendant which was negligently broken by the defendant and caused in whole or in part any of plaintiff's claimed injuries.

Dated: Sept. 26, 1955.

Glenn D. Peters,
5246 Holman Avenue,
Hammond, Indiana,

Harlan L. Hackbert,
208 S. La Salle Street,
Chicago 4, Illinois,
Attorneys for Defendant,
Elgin, Joliet and Eastern
Railway Co.

1 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—1466) * *

Record of proceedings in the above entitled cause of action before the Honorable Luther M. Swygert, United States District Judge, at Hammond, Indiana, beginning on the 19th day of September, 1955, at 10 o'clock A. M.

Appearances:

Justin Waitkus, Esq., of Gary, Indiana, representing the plaintiff;

Harlan L. Hackbert, Esq., of Chicago, Illinois, Glenn D. Peters, Esq., of Hammond, Indiana, representing the defendant.

2 Following the impaneling of the jury, and opening statements of counsel, a recess was taken until two o'clock in the afternoon.

And at two o'clock in the afternoon of said day, Monday, September 19, 1955, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: You may proceed.

And thereupon the plaintiff, to support and maintain the issues on his behalf, introduced the following evidence:

GEORGE MARJANIAN, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. Will you state your name to the Court and jury, please?

A. My name is George Marjanian.

The Court: How do you spell your name?

The Witness: M-a-r-j-a-n-i-a-n.

3 The Court: Your first name?

The Witness: George.

The Court: Mr. Marjanian, will you try, during your testimony, to speak loud enough so that all of the jurors can hear you? I think if you would look over towards them, it would help in their hearing.

The Witness: Yes, sir.

By Mr. Waitkus:

Q. Where do you live, Mr. Marjanian?

A. I live at 1077 Burr Street, B-u-r-r Street.

The Court: In Gary?

The Witness: Gary, Indiana.

By Mr. Waitkus:

Q. Are you married, Mr. Marjanian?

A. Yes, I am. I have one child, a girl, fifteen months old.

Q. Where do you work at present?

A. I work at Taylor Forge and Pipe Works.

Q. Did you at any time work for the Elgin, Joliet and Eastern Railway Company?

A. Yes, I did.

Q. When did you go to work for them?

A. I believe it was September, of '51.

Q. And in what capacity were you employed by them?

A. Timekeeper.

Q. Did you work out of any particular location?

A. Building 100, at Kirk Yard.

The Court: Building what?

The Witness: 100, at Kirk Yard.

The Court: Is that K-i-r-k?

The Witness: Right.

By Mr. Waitkus:

Q. Some of the jury may not be familiar with Gary. Can you tell them about where Kirk Yard is located?

A. Kirk Yard is located right behind the accounting office. Building 100 is the other side of the hump.

Q. What I am referring to, Mr. Marjanian—perhaps I am not making myself clear—I mean in reference to the streets in Gary, which side of the river, for instance, and how far it extends; can you tell the jury?

The Court: What part of Gary?

By Mr. Waitkus:

Q. What part of Gary, is it the north part, south?

A. It is the north part of Gary.

Q. And as a matter of fact, it is north of the Grand Calumet River?

A. Right.

Q. It starts—correct me if I am wrong—at Buchanan Street?

A. That's right.

Q. And runs west of Clark Road, or the Buffington Plant?

A. No, sir; it runs north.

Q. North?

A. That's right.

Q. Doesn't it also run west?

A. It is right across the street from the Merchant Mill. It is on Third, I believe it is.

Q. It is—

A. Third or Second, I couldn't tell you exactly.

Q. First or Second, on Buchanan, and runs north and south both?

A. That's right.

Q. And runs west?

A. Right.

Q. And what is the Kirk Yard district, what does it have in the way of railroad buildings or equipment or yards, can you tell us?

A. Besides the buildings?

Q. Yes.

A. Kirk Yard is the place where they switch cars back and forth, at the present now where they have this new hump; they send the cars down the hump into the yards. They can go to Joliet, and come back, or South Chicago, on these tracks.

Q. Is this strictly a freight yard?

A. Strictly a freight yard, for shipping back and forth.

Q. The E. J. & E., does it carry any passenger trains of any kind?

A. No.

Q. Nothing but freight?

A. Nothing but freight.

Q. Where do the freight trains run, between what points do they run?

A. They could run to Joliet, they could run to South Chicago, to the main mill there, U. S. Steel, and other places which I don't know right now.

Q. When you say Joliet and South Chicago, that is Joliet, Illinois, and South Chicago, Illinois?

A. Joliet, Illinois, and South Chicago, Illinois; and to East Chicago.

Q. Illinois and Indiana?

A. Right.

Q. What sort of products are shipped or freighted between the two states?

7

A. That could be anything.

Q. Well, I mean name some of the things.

A. Could be steel, liquor, could be anything.

Q. Do they have sidings in Kirk Yard where some of these freight cars would be parked, where things could be picked up?

A. Could be.

Q. Now, you say you were employed as a timekeeper?

A. That's right.

Q. And worked out of Shanty 100?

A. Correct.

Q. And who else worked out of Shanty 100 at Kirk Yard besides yourself?

A. At the time I was there?

Q. Yes.

A. Vern Gibson was there; and Ted Moore was there until he got fired; and a supervisor, a person by the name of Joe Schramm, was there.

The Court: He was the supervisor?

The Witness: The supervisor.

A. (Continuing.) And Mr. Bob Dangremond would come in and go out of there; he was, I believe, roadmaster.

There were numerous foremen who would come in and go out; tractor drivers, truck drivers, operate back and forth from Shanty 100.

8

Q. Were there any desks inside?

A. There were three or four desks inside.

Q. You said Vern Gibson. You meant Clairon Vern Gibson, the plaintiff?

A. That's right.

Q. As a matter of fact, you fellows referred to him as Vern all of the time; isn't that correct?

A. That's right.

Q. What time of day would you fellows start work?

A. Eight o'clock in the morning.

Q. Can you tell us what your duties consisted of as you started to work in the morning?

A. I would come in, and I had a few gangs in the morning—

Mr. Peters: A little louder, please.

The Court: We will have to shut the window or wait for that train to pass.

(Question read.)

A. When I first came in, I would go down to the tracks to certain shanties, check the gangs with the foremen, get their time, and check into Building 100. As I would
9 come in Building 100, I would register their time on their daily sheets, payroll sheets, and check it with my book I carry with me all of the time; and we would follow through with the distribution sheets every day, to find out exactly where these gangs were going to work, find out exactly what they were supposed to do, whether they were to put a new track in, or things like that. We had to report on these distribution sheets. We would get that from the foremen.

Then we would go to Brown Company, take the time-book with us, and check with him to see who worked that day, or not. He would register on his time sheet. Come back to Shanty 100.

And sometimes we would get a bunch of new fellows come in; we would make out their applications, make out these new forms, tax forms, things like that.

And afternoons we were supposed to go out in the field, check the men, and things like that.

Q. You say you went out to the field, checked the men?

A. Yes, sir.

Q. What do you mean by field checking?

A. Where these gangs would work, we would go out there, see if they were out there in the afternoon,
10 too.

Q. Where would these gangs work?

A. It could be anywhere on the tracks; they could be a mile up the tracks, or down the tracks; they could be up in the mills there; they could be anywhere.

Q. Would the section gang work on the right-of-way of the E. J. & E.?

A. Could be.

Q. And did they at times?

A. Yes, they did.

Q. Was it the duty of the timekeeper to go out to

check, to see whether these different fellows were working?

A. Well, the way I worked it, if it was too far away, I had the foreman check it for me. If it was a mile, or half a mile, I would go out in the field myself and check it and come back.

Q. Were you supposed to go out in the field and check these fellows?

A. Yes, sir, I was supposed to go out in the field and check them.

Q. What sort of work did these fellows do that worked in these gangs?

11 A. They would rip up the tracks, put new tracks in, or they would put a new rail in there, or tie, or put cinders along the tracks; it could be numerous different things.

Q. And would they at any time come into this building or shanty 100, that is, these laborers, at any time?

A. If they got hurt, they would come in; we would fill out their forms. Sometimes we couldn't get anybody to take them down to the hospital, and Vern and I would take them down ourselves.

Q. Can you describe whether or not there were any other duties that you and Mr. Gibson had to do while you worked out of this building 100?

A. Well, besides the distribution sheets and lining up the men and checking them out in the field, once in a while we would get these derailment reports, which the foremen would give us to fill out, make out the blank forms, and turn them in.

Q. Did you have a telephone in this building?

A. Yes, we did.

Q. Did you ever receive any telephone messages from the roadmaster?

A. A couple of times, I did.

12 Q. And did you receive messages from the yardmaster?

A. Is that Mr. Paige?

Q. Well, I don't know just which of those fellows—

A. We had phone calls coming in, yes, sir.

Q. You had phone calls coming in at different times?

A. Yes, sir.

Q. Did you ever have to carry any messages from the yardmaster to any of the supervisors?

A. Once in a great while, we did.

Q. In other words, if the supervisors weren't in the building, you fellows took over—

A. Let me put it this way, if I could.

Q. Beg pardon?

A. I would like to explain it this way: We had a messenger there at times, but they let the messenger go, and at that time Vern and I relayed the messages to the foremen or to the yardmaster when the phone calls came in.

Q. Was this telephone you fellows had in this building run through the regular exchange, or was it a special phone?

A. We had direct lines; we had lines coming in
13 from South Chicago or Joliet, Illinois, and the main office.

Q. Can you describe the inside of this building that you timekeepers worked in?

A. It was a small building.

The Court: How many rooms?

The Witness: One big room.

By Mr. Waitkus:

Q. How many desks?

A. Our section had I would say about three or four desks.

Q. Were they evenly spaced?

A. No; they were put close together.

Q. Do you recall the desk that Mr. Gibson worked at?

A. Yes, I can.

Q. Was it out in the middle of the room, or was it—

A. No, Mr. Gibson's desk was facing the wall; he was exactly right in the corner, I would say the right corner of the building there.

The Court: If this were the building, where would his desk be?

The Witness: It would be on this side (indicating.)
14 The Court: Where?

The Witness: In the right corner.

By Mr. Waitkus:

Q. Now, can you tell us whether you had a number of windows in this building?

A. We had windows in there.

Q. Ordinarily, did you fellows work at night in the building?

A. Provided we had overtime, we worked.

Q. Well, now, during the daytime, did you have to use any lights of any kind?

A. Not that I can think of. We had plenty of sunlight coming in.

Q. Now, at night, did you have to use lights—of course, you did.

A. Yes, we did.

Q. How many electric lights did they have in there, can you tell us?

A. Could be two lights on the ceiling there, with a reflector around it, probably.

Q. Well, was it lighted very well, or can you tell us whether it was dim?

A. It was dim lighting.

Mr. Hackbert: If the Court please, I think it would be better to let the witness describe it in his own language. I object to the question, as leading.

The Court: Overruled.

What was the answer?

(Answer read.)

By Mr. Waitkus:

Q. How high would you say this ceiling was in this building?

A. I would say about 12 feet high, either 10 or 12 feet high.

Q. Did you have any desk lamps of any kind?

A. I don't remember any.

Q. Now, during the time that you worked there, can you tell us whether or not there was any door mat in front of the door, or foot scraper?

A. I don't remember having any.

Q. Now, these laborers or section gang that came in, would they ever bring any equipment in with them, or just come in?

A. Well, at the time I worked overtime, I remember they brought shovels in there, to go out to work on the snow. That's the only time I remember them bringing any equipment in there.

Q. Can you tell us what kind of floor they had in the building?

A. They had a wooden floor, hardwood floor.

Q. Was it right on the ground level?

A. No, it was about, I would say, a foot and a half high.

Q. Off the ground?

A. Off the ground.

Q. Can you tell us what the condition of this floor would be after say eight hours of work?

Mr. Hackbert: If your Honor please, I object to that. The only question with which we are concerned here is the condition on the day in question. To talk generally about what it would be after eight hours of work is immaterial.

The Court: Well, except as it might bear on any notice they might have had.

I will overrule the objection.

Of course, the pertinent question is, how was the floor on the day in question.

Mr. Waitkus: We will get to that, your Honor.

17 The Witness: Will you repeat the question, please?

(Question read.)

A. It would be dirty, naturally.

By Mr. Waitkus:

Q. Well, what kind of dirt might accumulate in this building?

A. Whatever they brought in.

Mr. Hackbert: I object to what "might" accumulate.

Mr. Waitkus: I will withdraw the question.

By Mr. Waitkus:

Q. Tell us what kind of dirt you have seen in that building after eight hours.

A. Cinders, dirt, could be sand, or anything like that, could be grease, could be pebbles, could be anything.

Q. Now, in the morning when you fellows checked in, did anyone else come into this building for any other purpose, other than the two timekeepers and the supervisor?

A. No; like I said before, when I came to building 100, after checking my men out in the field, Mr. Dangremond, Mr. Schramm, and the other foremen got to-

18 gether in building 100 and lined up other men to go out to work. They could be welders, they could be tractor drivers, or truck drivers; could be others, too.

Q. In other words, all these different fellows might from time to time be in that building?

A. That's right; they might be in the building, building 100, early in the morning, at eight o'clock.

Q. Can you tell us whether anybody used this building during the noon hour?

A. Sometimes the truck drivers would come there to eat their lunch.

Q. They would eat their lunch in the building?

A. A few of them, I would say.

Q. You said you had daily reports that you had to get out?

A. That's right.

Q. Did any of these reports pertain to equipment that was used on the railroad right-of-way?

A. I couldn't say; I don't remember that far back.

Q. Well, by equipment, I mean did these reports refer to any ties, or rails, or ballast, or things of that sort?

A. We put on our distribution sheets the amount 19 of rails that were used, things like that.

Q. You put those on the distribution sheets?

A. On the distribution sheets, that's right.

Q. And where would you send these distribution sheets?

A. To the main office.

Q. Where would that be?

A. Up front on Buchanan Street there.

Q. This stuff all went through the main office?

A. They went to the main office. I believe they went to Joliet from there; I don't know.

Q. Were those reports sent in every day?

A. Were they sent in every day? No.

Q. How often did you send these distribution reports in?

A. Every month.

Q. Did you have to keep a record of the time on these section gangs?

A. The time was divided up; the foreman would put the time down, divide them up where they worked; and the amount of material they used; the foreman would bring the sheets in, give them to me, and I would put them on my distribution sheets.

Q. The fact is, somebody had to figure up how 20 much each of these section laborers received on pay-day; isn't that true?

Mr. Hackbert: I think that is leading, if the Court please.

The Court: Well, it is leading.

Mr. Peters: Why not let the witness say what he did. I think he is capable of doing it.

The Court: I will sustain the objection.

By Mr. Waitkus:

Q. Mr. Marjanian, tell us whether or not you had anything to do with the payroll at all.

A. Yes, sir, I worked on the payroll.
Q. You worked on the payroll?
A. Yes, sir.
Q. Will you explain to the jury what you did?
A. On these payroll sheets, we totaled the amount of hours that these laborers worked; we put the total on the end of the sheet there; we put their wages, according to the hourly rate, what they made, we would multiply the hours with the rate to get the amount they made and put it on the sheet, and balance the whole sheet out.
Q. Now, how often would these payroll sheets have to be made up?
21 A. Twice a month, about the middle of the month or end of the month.
Q. Who would give you instructions or orders when these payroll sheets had to be made up?
A. The main office would call us up a day or two ahead of time and let us know the day they were supposed to be in.
Q. And about what part of the month would the payroll reports have to be in to the front office?
A. At the month.
Q. What part of the month? You say you sent them in twice a month.
A. I would say about the 12th, 13th, or 14th, or maybe the 15th; the end of the month could be the 28th, 29th, or the 30th.
Q. In other words, they paid twice a month?
A. That's right.
Q. Now, at such times as these payroll sheets had to be gotten into the front office, can you tell us whether you were able to get them out to the front office during your regular work hours?
A. It was impossible at times; I had to take them home and work on them.
Q. Did you fellows ever work overtime on these
22 payrolls?
A. Yes, we did.
Q. By "we," I assume you mean you and Mr. Gibson?
A. That's right.
Q. You were the only two timekeepers that worked in shanty 100 during that time?
A. What time are you referring to?

Q. I am referring from the time you started until say the first part of December, 1951.

A. Just me and Gibson, yes.

Q. Now, the first payroll report that had to be sent in to the front office, did you get a call from the front office about the first part of December, 1951, for such report?

A. Are you referring to the payroll?

Q. That's right.

A. I believe we got a call either the 12th or 13th; I couldn't say.

Q. And did you fellows work on one of those evenings, December 12th or 13th, 1951, to get these payrolls in?

A. Yes.

Q. What were your regular hours that you worked during the day?

A. I believe at that time we worked from 8 o'clock
23 to 4:30 or 5 o'clock.

Q. And after 4:30 you and Mr. Gibson, if you worked, got overtime?

A. Correct.

Q. Now, on December 12th or 13th, did you work overtime to get these payroll reports out?

A. Yes, those nights.

Q. Now, can you tell us the condition of the floor that evening while you fellows were working on these payroll reports on December 12th or 13th, 1951?

A. I would say that it was a little bit dirty.

Q. Can you tell us whether at that time there was any door mat or foot scraper in front of the door?

A. I didn't see any; I couldn't say exactly I didn't see any.

Q. Do you recall ever seeing any at any time while you worked there as timekeeper?

A. I believe they had one sometime back; I couldn't tell you when; I think they had one on the ground as you went up the steps.

Q. And at the time of December 12th or 13th, do you recall—

A. I don't remember whether they had one on December 12th, or not; I couldn't say.

24 Q. Can you tell us what sort of dirt was on the floor on that evening of December 12th or 13th?

A. Well, it was dirty, but I couldn't say exactly what

was in there; it was slippery; dirt; it could be a little bit of cinders in there, I couldn't tell you exactly.

Mr. Hackbert: I move to strike out what "could" be.

The Witness: Well, it was very dirty, let me put it that way.

The Court: What could be, of course, that will go out. The best you remember as to what was there on that occasion on the floor.

The Witness: There was a little cinders on the floor.

By Mr. Waitkus:

Q. Now, can you tell us about the lighting condition in the building that evening?

A. Yes; according to my knowledge, it was very, very dim because I myself had a hard time working on the adding machine, trying to figure the figures out.

Q. You say you were working on an adding machine?

A. Correct.

25 Q. Whose adding machine was that?

A. I used Brown Company's adding machine, and sometimes Mr. Gibson's.

Q. Did the company furnish you with any adding machine?

A. No, they didn't, but they told me any time I wanted to use one I should come down to the main office and use it.

Q. Where was the main office located?

A. On Buchanan Street.

Q. Did you have occasion to go to the main office to use the adding machine?

A. At times I went there but it was kind of crowded; I preferred to stay in building 100 to get the payroll out; I thought I could work better there.

Q. Well, if you had your daily duties and you had to work overtime to get the payroll report out, could you get an adding machine from the front office at 4:30?

A. No, sir.

Q. Was the front office open at 4:30?

A. They closed around 4:30 or 5 o'clock.

Q. Could you take any of the adding machines or any of the equipment out of there?

26 A. I never asked anyone; I couldn't say.

Q. But you never did take any from there to building 100?

A. No, sir.

Q. Now, referring to the evening of December 12th or 13th, of 1951, was Mr. Gibson doing the same sort of computing that you were on the payrolls?

A. Yes.

Q. How many of these section laborers did Mr. Gibson have, if you know, on his payroll list?

A. I couldn't give you the exact number. He was carrying a lot of men.

Q. Can you give us an approximate figure?

A. Maybe 150, 200; I couldn't say.

Q. How many were you carrying on the payroll?

A. I was carrying around 130, 140, sometimes 150; all depends upon whether new men come in, more men quitting than new coming in; sometimes I would go up to 160, 170, and then get down to 130.

Q. How late did you fellows work that evening of December 12th or 13th, whichever night it was?

A. I believe it was 8:30.

Q. And after you finished with your payroll reports, were they ready to be turned in the following day?

27 A. No, sir.

Q. Will you explain that to the jury?

A. We never closed our payrolls out for the simple reason that the next day we had to go out to check more men out in the field; we had to calculate their time on the payrolls; then we came back, we worked on the payrolls, and turned them in in the afternoon. We didn't know whether the man was going to show up the next day to work, or not.

Q. This evening you say you worked until 8:30. When you fellows finished with the payrolls on this evening you refer to, can you tell us what you did with the adding machines?

A. Well, I would give the adding machine to Vern to put underneath his desk for the reason that I thought maybe the fellows would come in the next day and play around with it.

Mr. Hackbert: I move to strike out what he thought.

The Court: Well, overruled.

A. (Continuing.) Because at times the truck drivers would play with the adding machine, and one time I believe they did jam Mr. Gibson's adding machine.

28 Q. And you would put these—

A. I would hand it to Mr. Gibson; he put it under

his desk. The next morning we would come in, take it out and use it.

Q. Did you fellows follow this procedure on this particular evening?

A. Yes.

Q. Whose adding machine was being placed under the desk, if you recall?

A. I think it was Mr. Brown's adding machine; I couldn't say; it has been about three and a half years. But there were times we had two adding machines there, and sometimes I would put Brown's underneath Vern's desk and he would take his home again.

Q. Did you hand an adding machine to Mr. Gibson that evening?

A. Yes, I did.

Q. And can you tell us whether he placed it under the desk that evening?

A. He put it under his desk, but I didn't see him do it for the reason that I was putting my work away.

Q. Can you tell us whether anything happened that
29 was unusual at that time?

A. Well, he put the adding machine under his desk. I was putting my work away. All of a sudden I heard a noise; I looked over there; I saw Mr. Gibson holding his head. I asked him what the reason was, what happened. He didn't say anything to me for about two minutes. Then all of a sudden he told me to take his key, and start his car, which I did, let his car run; I came back in, and he started to tell me that he slipped under his desk and hit his head under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time.

Q. Did you start his car for him that night?

A. Yes. I believe I did take an adding machine to his car, I believe it was Mr. Gibson's. I believe I did use Mr. Brown's that night; but I am not positive on it.

Q. Did he complain that evening of any pain?

A. Yes, he told me he had a headache, and the next day he came in and complained about a headache. I asked him what was wrong. I told him, why didn't he take a day off and go home; and he said, no, he had a lot of work to get out. He was complaining all day long
30 for about three or four days about headaches.

Q. After that, did he have any complaints, do you know?

A. Once in a while he did.

Q. Now, how long did you work there as timekeeper, Mr. Marjanian?

A. I believe I started in September, of '51. I left there, it could be about May, of '52.

Q. '52?

A. Correct.

Q. When you left there, was Mr. Gibson still working there?

A. I believe he was. I think that they switched Mr. Gibson to the steel mills over there.

Q. While you were there, working out of this timekeeper's building, can you tell us whether you noticed any change in Mr. Gibson's walk at any time after December 12th or 13th?

A. Yes, sir; he was limping.

Q. Do you recall when he may have started limping?

A. I couldn't say.

Q. Can you tell us whether that limp got any better or got worse as he went on working?

A. I would say it got a little worse.

31 Q. At the time that you left the employ of the E. J. & E., in 1952, Mr. Gibson was still limping at that time?

A. Yes.

Q. Mr. Marjanian, have you ever been in court before?

A. No, sir, I haven't.

Q. Had you ever known me prior to this case?

A. Before this case?

Q. Yes.

A. No, sir.

Q. Have you ever gone back to work for the "J" after you left there?

A. No, sir, I haven't, but they have called me about numerous jobs. I did turn Mr. Leo Govert down. I think he wanted another timekeeper. I told him I had a good job now.

Q. Well, when was this?

A. This was way back, I think in '52. I couldn't tell you the exact time or date.

Q. Did they interview you at that time?

A. No, sir. Leo called me up one time about a timekeeper's job. I told him I was well situated at Taylor Forge; I couldn't take it.

32 Later on, I think my mother got a couple of calls from the E. J. & E. I couldn't tell you what they were about.

Q. You were subpoenaed to come to court, were you?

A. Correct.

Mr. Waitkus: You may cross-examine.

Cross-Examination by Mr. Hackbert.

Q. Mr. Marjanian, your work during all of the period of time you were employed by the E. J. & E., from September, 1951, to May, 1952, was as a timekeeper, was it not?

A. Correct—no, I am sorry; I have to say something different.

Q. All right.

A. I worked two months as a material clerk in the office, in the main office on Buchanan Street.

Q. That was the first two months that you worked?

A. It was the last two months I worked.

Q. The last?

A. That's right.

Q. So that you worked as a timekeeper from September, '51, until say March, 1952?

A. About that time.

33 Q. And during all of that time you worked, or your headquarters at least were in building 100?

A. Correct.

Q. And did Mr. Gibson work there as a timekeeper during all that same period of time?

A. I will say that he did.

Q. He was already working there as a timekeeper when you first came to work?

A. Correct.

Q. Now, he kept time for certain crews, records for certain crews, and you kept the time and records for certain other crews?

A. Right.

Q. Now, so far as these new employees were concerned for whom you filled out the application forms, neither you nor Mr. Gibson had anything to do with hiring those men, did you?

A. I never said I hired them. We wrote up their applications, and everything.

Q. In other words, after someone else had made the

decision to hire these particular employees, they were sent down to building 100 for you or Gibson to make out the form?

A. Right.

34 Q. And those application forms were printed forms, were they not?

A. Correct.

Q. And the type of information that you put on those forms, that you had to write in, or Gibson had to write in, was such information about the employees as the employee's name, his Social Security number, his address, his date of birth, his citizenship, and the name and address of his next of kin; is that right?

A. Plus many more.

Q. Well, what else was there?

A. Well, his previous job that he had, where he worked before that, his mother's name, and his father's.

Q. Is that all of the information?

A. There were others that I can't remember right now.

Q. But that was substantially all?

A. Right. Besides the tax forms that we made out.

Q. If a man who was being hired had previously worked for the E. J. & E., did you fill out a new application form for him, or just refer to the old one?

35 A. Referred to the old one, I believe.

Q. So that the only new employees for whom you had to do any paper work were men who were being hired for the first time?

A. I think so.

Q. And about how many men would be hired for the first time in a week's time in the fall and early months of 1951?

A. About how many?

Q. Yes.

The Court: You mean on the average of what?

Mr. Hackbert: On the average per week.

The Witness: Per week?

Mr. Hackbert: Yes.

A. I would say around 40 or 50 coming in.

By Mr. Hackbert:

Q. You would take half of them, and Gibson would take half of them?

A. Right. There were weeks there were more than that.

Q. Now, how many new employees came in to apply for work on December 12th or 13th for whom you filled out employment applications, if you remember?

36 A. I don't remember.

Q. Do you know how many came in to see Mr. Gibson during those two days?

A. I don't remember.

Q. Do you know whether any new employees came in to see either one of you on either of those two days?

A. I don't remember.

Q. Now, these distribution sheets that you spoke of, those were reports of the materials that had been used in repairing the tracks and right-of-way in the yard, were they not, and you would fill those out once a month?

A. Correct.

Q. Now, would you keep a kind of running record from day to day, or would you fill them out from start to finish at one time?

A. Day to day.

Q. And you would make up those distribution sheets from information that was furnished to you by the foremen of the gangs?

A. Correct.

Q. Would they come in every day and give you a list of what work they had done and what materials they had used?

37 A. We received it from day to day, I believe it was.

Q. Now, how would you receive it?

A. In written form.

Q. Would it come in by messenger or company mail service, or would the foreman—

A. It was given to us by the foreman himself.

Q. Would they give them to you at the beginning of the day's work for the previous day, or at the close of the day's work?

A. At the close of the day.

Q. Now, neither you nor Mr. Gibson directed the foremen what work to do, did you?

A. No, sir.

Q. Your work, so far as those distribution sheets were concerned, was simply to put down on the sheet of paper the information that the foremen had furnished?

A. Correct.

Q. Now, you spoke also of going over to Brown Company to check to see what men had worked. What business was Brown Company engaged in?

A. They had—Brown Company was at the camp where these gandies stayed.

38 Q. They operated the camp where the section laborers wanted to live?

A. That's right.

Q. How far away from building 100 was that section laborers' camp?

A. I would say about a block and a half, two blocks.

Q. And the Brown Company ran the commissary and supplied the living accommodations?

A. That's right.

The Court: They were not working for Brown, then?

The Witness: No, they were working for the E.J. & E.

By Mr. Hackbert:

Q. What you had to check up at the Brown Company was to see what information they had about what men were working that particular day?

A. That's right.

Q. And, similarly, these field checks that you and Gibson made, the purpose of that was to determine what men were actually at work that day?

A. Correct.

Q. Would you check the list against the list that the foreman furnished you with that day?

39 A. Yes, I did.

Q. When would the foreman give you a list of the men who were working in his gang on a particular day?

A. Sometimes the foreman himself would check the men and send in a little slip to me. At times I would go out myself, and check myself.

Q. When you went out yourself and checked for yourself, how frequently during the week would you do that?

A. Sometimes I would go twice a day, sometimes once.

Q. Sometimes not at all?

A. It all depends. If I had a lot of work to do, the foreman would bring in their time. I couldn't get around to it.

Q. In other words, that was something that was more or less up to you to determine whether or not you had the time available to go out into the field to check the gangs?

A. At the time that I thought I should go out there, I went out there. There were times when you were loaded down with a lot of work that you couldn't do it.

Q. When the foremen turned that information in
40 to you, or when you went out in the field and checked the gangs yourself, again, so far as those crews were concerned, neither you nor Mr. Gibson directed those crews what work to do?

A. No, sir.

Q. And you didn't direct the foremen of those gangs which men to use?

A. No, sir.

Q. That is true also in Mr. Gibson's case, isn't it?

A. Correct.

Q. Again, all that your job and Mr. Gibson's job was, as concerned those time reports of the foremen, was simply to transfer the information that they gave you from their check list to the payroll sheets?

A. That's right.

Q. On the payroll sheets there were shown in columns across the sheet a man's name, his payroll number, his occupation, and then there was a column for each day of the half month in which you could make an entry as to how many hours that man had worked on that day, if he did work?

A. Correct.

Q. How many hours a day did the section crews work?

A. Eight hours a day.

41 Q. And unless there was some unusual circumstance which resulted in the man's working less than the full day, it was always eight hours for each day that the man worked?

A. If he was sick, we would go down to the camp, if he worked only four hours, we would put down four hours.

Q. Some days, there might be a day when he didn't work?

A. Right.

Q. And these laborers in these extra gangs like that are transients, they come and go?

A. Correct.

Q. But ordinarily the task of adding up how many hours a man had worked in a given pay period was a matter of adding up so many 8's?

A. Right.

Q. Normally they would work five days a week?

A. Normally.

Q. So far as the laborers in the gangs were concerned, nearly all of them took the same rate of pay, did they not?

A. They varied.

Q. Didn't most of them, the great bulk of them, 42 operate at the same hourly rate?

A. Same hourly, that's right.

Q. And when you would get this call to turn in the payroll records, that would come in a couple of days before the payroll was due to be turned in?

A. Correct.

Q. Would you carry this payroll through to the end of the half month period? By that, I mean, would one payroll cover the 1st to the 15th, and another payroll the 16th to the 30th or 31st, as the case might be?

A. Correct.

Q. Now, would you complete the payroll through the last day of the pay period before you turned it in?

A. Yes, I did.

Q. And of course the word always came through at about the same time during the two half-monthly periods, didn't it?

A. Right.

Q. You knew that toward the end of the month the payroll had to be turned in?

A. Absolutely.

Q. And you knew that the call would come about 43 three days before that?

A. Two days, or one day.

Q. And would you make these entries on the payroll currently during the days of the month?

A. I would try to keep it from day to day, put them on.

Q. So that when you knew that the payroll was due to be turned in, in a day or two, you were normally pretty well up to date?

A. No, sir.

Q. How far behind would you be?

A. It all depended. If we had new men to sign up, I fell behind.

Q. Would you work on the payrolls every day?

A. I tried to.

Q. Would Mr. Gibson work on the payrolls every day, so far as you could determine?

A. I believe so.

Q. And one night toward the end of the payroll period

it was your customary practice for you and Gibson to work overtime?

A. Correct, provided we called up Mr. Kinzel, told him we were behind, and he would decide whether to give us four hours, two hours, or what.

44 Q. In other words, it wasn't within your own discretion or judgment whether or not to work overtime, you had to have Mr. Kinzel's permission to work overtime?

A. Correct.

The Court: Because of the weather conditions, I think we will take more recesses than we would ordinarily, perhaps not in length, but space them more frequently.

As a matter of convenience, if you ladies and gentlemen would like to, you can go into the library here, rather than to climb the steps, during the recesses.

If the gentlemen would like to remove their coats, they are free to do so.

We will take about a five-minute recess.

(A short recess was taken.)

By Mr. Hackbert:

Q. Now, Mr. Marjanian, one or two more questions about this payroll procedure:

As I understand it, toward the end of the payroll period, when you and Gibson would work overtime, you wouldn't carry the payrolls out to the point of multiplying the

45 total amount of time by the hourly rate of pay because you had to wait to get the figure for the next day or two?

A. No, sir, we didn't work it that way. We carried the men, we multiplied the hours and everything else, and the next day, if we saw that they weren't working, we took them off; otherwise, we carried them as 40 hours a week.

Q. In other words, you carried them up to the point of where the payroll would be and what they would be entitled to if they continued to work?

A. If we saw they worked the first four days, we figured they would work the fifth day.

Q. If the remaining days in the payroll period were Saturday and Sunday of the week, then of course they wouldn't be working those days?

A. No.

Q. As I understand it, the night before the end of the

payroll period, that you would put in these hours of overtime, you wouldn't actually complete the payroll, it wouldn't be completed until the following day?

A. We completed it—I did.

Q. At night?

46 A. That's right.

Q. Now, you mentioned also making out derailment reports. How frequently during the course of a month's time would you have occasion to make out such a report?

A. Maybe once a month, or once every three months; it all depends.

Q. What was the nature of the information that you had to compile or fill in on the derailment reports?

A. The foreman gave us the information, which we copied on these forms. I think there were about eight of them.

Q. What sort of information did you copy?

A. Information that the foreman gave us.

Q. Well, I mean, what would that be?

A. Well, like a car turned over, or bad track, or something like that.

Q. Would you show where the derailment was, what it was that it derailed, and what work was done?

A. The time, the date; that's right.

Q. And there again the work that you and Gibson did in the making out of those derailment reports was simply to transfer the information that the foreman gave you from papers that the foreman turned over to you

47 onto the regular company form?

A. Correct.

Q. You mentioned also that you filled out personal injury reports.

A. That's right.

Q. Those would be the reports that were made out when an employee working in the yard in one of the gangs for whom you were keeping time was hurt?

A. Correct.

Q. How many such reports would you have occasion to make out in the course of a month's time?

A. Once in a while.

Q. Those reports were, again, on a printed form?

A. Right.

Q. And, again, your job was to transfer the informa-

tion that the foreman furnished you to the printed personal injury forms?

A. My job was to get all of the information off the injured person himself.

Q. Did you talk to the injured man?

A. That's right.

Q. And get from him such information as you could?

A. I would ask him how the accident occurred, and everything else.

48 Q. Would you take reports also from any other members of his crew?

A. Did I take any other reports?

Q. Yes.

A. No, sir.

Q. Just a report from the injured man himself?

A. Yes, sir.

Q. If you couldn't get the information from the injured man, you would get it from the foreman?

A. From the foreman.

Q. This building 100 was the headquarters so far as the maintenance workers or construction workers in the yard were concerned?

A. Headquarters for what?

(The question was read.)

A. No, sir, it was mainly for the gandies—

The Court: The what?

The Witness: The gandies, laborers and also maintenance.

But I don't know where the construction workers fitted in.

By Mr. Hackbert:

Q. But Mr. Schramm was the man who supervised their work?

A. Correct.

49 Q. He gave orders to the foremen as to the work to be done?

A. Correct.

Q. These report forms were kept there in building 100 as a matter of convenience, were they not?

A. Yes.

Q. And you and Gibson were the clerical workers who were working in that building, and that's how it came about that you were the ones to fill out the reports?

A. We filled them out, yes.

Q. I assume that when the word came in toward the end of the payroll period that these payrolls were to be turned in a day or two later, you spent as much time as you could on those days working on the payroll records?

A. We spent a lot of time on them.

Q. You didn't make them out just during the period of overtime that you worked that night?

A. There were times that I had to take them home myself, that I didn't get overtime; I did it on my own.

Q. Well, I mean you worked on them currently during the regular eight hours of the day, as well as during the overtime that night?

A. Correct.

Q. And the accounting office, as I understand it, was open from 8 in the morning until 4:30 or 5 in the afternoon?

A. Correct.

Q. You or Gibson could have gone there and used the adding machines there?

A. We could have.

Q. As I understand your testimony, you never asked for permission to bring one of the adding machines from that office down to building 100 to use either during the day or during the overtime that you put in?

A. I never did ask them.

Q. For how long a period of time after you started there in September, 1951, had you been borrowing an adding machine from the Brown Company?

A. How many times?

Q. Yes.

A. As often as I could get it.

Q. Would you get one everytime toward the end of the payroll period from the Brown Company?

A. If I wasn't using Vern Gibson's, I went down to the Brown Company and got theirs.

Q. And how frequently did Mr. Gibson have his machine there?

A. I believe he would bring it in every week. Some weeks, he missed in between there.

Q. Now, when you say he would bring it in every week—

A. Sometimes, if he didn't bring it in, he used mine from Brown's.

Q. Did you keep those adding machines there every

day of the month, or would you have them there just during the day or two of the end of the payroll period?

A. Just the day of the payroll.

Q. And during the regular course of your work during the other days of the month, there was no work being carried on there in building 100 of an accounting nature that required an adding machine, was there?

A. No.

Mr. Hackbert: Have you had those pictures marked with exhibit numbers?

Mr. Waitkus: No, but you can use them.

Mr. Hackbert: Since they are yours, they probably
52 should be marked as your exhibits. Do you want to have them marked?

Mr. Waitkus: That's right. You can put them in. We intended to put them in with the next witness, anyhow, so you can go ahead and use them.

Mr. Hackbert: My point is, shall we have them marked as plaintiff's exhibits?

Mr. Waitkus: Mark them as plaintiff's exhibits.

(Photographs were marked Plaintiff's Exhibits 1 to 6, both inclusive, for identification.)

By Mr. Hackbert:

Q. Mr. Marjanian, I show you what have been marked Plaintiff's Exhibits 1 and 2. I will ask you if the building shown in those photographs is building 100?

A. Yes.

Q. Building 100 was a one-story building, was it not?

A. That's right.

Q. And about how big was it?

A. I will say 20-25 feet by 15; that is a rough
53 estimate.

Q. And where was it located in Kirk Yard?

A. Where?

Q. Yes.

A. By the carpenter shop.

Q. Generally speaking, was it in the eastern end of Kirk Yard, and somewhat to the north?

A. About there.

Q. How far away was it from this accounting office?

A. About three blocks.

Q. Now, the interior of the building was divided by a partition into, well, really like two rooms?

A. Right.

Q. And the portion toward the east side of the building was used by the B. & B. department?

A. Correct.

Q. You and Gibson worked in the part of the west of the building?

A. That's right.

Q. How big was the area in which you and Gibson worked?

A. I would say about 10 by 15, 10 by 18.

Q. There was an outside door in the B. & B. end of the building, and an outside door in the west wall in your part of the building?

54 A. That's right.

Q. And there were windows on the north, west, and south sides?

A. I think there were.

Q. Now, the desks were up against the south wall of the building?

A. What side are you talking about?

Q. Well, the desk that Mr. Gibson used and the desk that Mr. Schramm used—

A. Were on the south side of the building.

Q. —were back to back, with the side against the south wall of the building?

A. Correct.

Q. Plaintiff's Exhibit 3 shows Mr. Gibson sitting at his desk, does it not?

A. Correct.

Q. And the window shown in the upper left-hand corner of the picture—I am speaking of this window—is a window in the south wall of the building?

A. Correct.

Q. The filing cabinet that we see along the right-hand margin of the picture stands against the west wall of the building, does it not?

55 A. Right.

Q. And there appears to be a window there in the west wall of the building that you can see just above and beyond the filing cabinet?

A. That's correct.

Q. Here on the left-hand margin of the picture, the desk on which the telephone is sitting is Mr. Schramm's desk?

A. That's right.

Q. Where was your desk located?
A. Right next to Mr. Schramm's.
Q. And was it parallel to Mr. Schramm's desk?
A. Sideways.
Q. Sideways. In other words, the back of your desk was against the right-hand side of Mr. Schramm's desk?
A. No.
Q. Well, now—
A. I was sitting like this (indicating); I am sitting on this side, and Mr. Schramm is sitting on this side; and Mr. Gibson on that side.
Q. Would you and Mr. Schramm both be facing the same way when you were sitting at your desks?
A. No.
56 Q. You would be sitting at right angles to each other?
A. Yes.
Q. In other words, from where you are sitting now, will you turn and face directly out from the witness chair in the normal position of the witness?
(The witness complied.)
Q. If this was the back of your desk here, the front of the witness box, Mr. Schramm's desk would be placed, roughly, where the court reporter's desk is?
A. At the back of my desk?
Q. If this (indicating) is the back of your desk.
A. Right.
Q. This then is Mr. Schramm's desk, and this where Mrs. Bretsch, the court reporter, is sitting, is the back of Mr. Schramm's desk, is it not, and Gibson would be sitting facing where I am standing; Schramm would be sitting here (indicating)?
A. I think so, yes.
(Photographs were marked Defendant's Exhibits 1 to 4, both inclusive, for identification.)
57 Q. I show you what has been marked Defendant's Exhibit 2, Mr. Marjanian, and I will ask you, does the desk that you used show in that picture?
A. No, sir.
Q. The desk that you sat at when you were working there in building 100 as a timekeeper would be in the place that the light colored chair in the bottom center of the photograph is, would it not?
A. Is this Gibson's desk right here?
Q. No, that is Mr. Schramm's desk.

A. It would be right where the chair is at.

Q. Your desk would be right where the light colored chair is?

A. Yes. I wasn't sitting in that kind of a position.

The Court: I don't think the jury is getting this very well.

By Mr. Hackbert:

Q. Now, I show you Defendant's Exhibits 3 and 4. Those photographs show the north side of the portion of the building 100 that was occupied by you and Gibson, do they not?

A. Did you say not occupied?

Q. No; occupied by you and Gibson.

A. That's right.

58 Q. And in Defendant's Exhibit 3, the door that we see in the background of the photograph is the door that leads into the B. & B. section?

A. That's right.

The Court: What do you mean by B. & B.?

Mr. Hackbert: It is either Bridges and Buildings, or Buildings and Bridges, I don't know which.

Which is it, Art?

Mr. Cogswell: Bridges and Buildings.

Mr. Waitkus: The last time I heard B. & B. mentioned, it sounded like a drink.

Mr. Hackbert: That shows you have been to the wrong kind of places.

By Mr. Hackbert:

Q. Mr. Marjanian, the area that is shown in Defendant's Exhibits 3 and 4, the long bench and the chairs, the little desk, that is the area into which these other men of the outside crews would come, is it not?

A. That they would occupy.

Q. In other words, when these foremen would come in to report for work in the morning and to get their assignments, they would go to Mr. Schramm for that

59 information, wouldn't they, or to Mr. Dangremond?

A. That's right.

Q. Mr. Dangremond was Mr. Schramm's immediate superior?

A. Correct.

Q. As roadmaster, he had charge of the tracks and yard layout?

A. That's right.

Q. And the foremen would come in there at the beginning of the day's work in order to get their orders?

A. That's right.

Q. Would they come in every day?

A. Every day.

Q. They wouldn't have any occasion to come either to your desk or to Gibson's desk to get their orders?

A. At times they would sit on my desk and Gibson's desk.

Q. At times they would sit at your desk?

A. That's right.

Q. And that would be at the beginning of the day's work?

A. Right.

60 Q. Before they had been out working around in the yard?

A. Right.

Q. Would the members of the section gangs come in to get their orders, or would they get their orders on the job from the foreman?

A. They would get them on the job from the foreman.

Q. Then at the conclusion of the day's work the foremen would come in and report to Mr. Schramm or Mr. Dangremond what work they had done that day?

A. This is after the eight hours?

Q. After the work was done, yes.

A. Yes.

Q. And from time to time would any other employees have occasion to come into that building for orders?

A. Not that I can think of.

Q. And these truck drivers or others who came in to get orders, they would come in early in the morning, at the beginning of their day's work for their orders?

A. Correct. And sometimes they would come in at the lunch hour, to eat their lunch.

Q. Sometimes they would come in at the lunch hour to eat their lunch. About how many people would

61 there be who would come in to eat their lunch there?

A. Sometimes three, sometimes four.

Q. They would sit along these benches or in these chairs along the north side of the wall?

A. Sometimes they sat on the desk.

Q. Did you and Gibson also eat your lunches there?

A. At times.

Q. And where would you sit?

A. I would sit at my desk sometimes.

Q. And he would sit at his desk when he ate lunch there?

A. Right.

Q. Any of these men who came in to eat their lunch in the building would have no occasion to be making out any reports or filling out any forms, would they?

A. Not that I know of.

Q. There would be no occasion for them to sit down at your desk or Gibson's desk, other than just as a matter of convenience, to eat their lunch?

A. Right.

Q. Similarly, when any of these men came in at a time when it was snowing, and brought their shovels in with them, that would be when they were getting their
62 assignments to go out into the yard and to do the snow shoveling work?

A. That's right.

Q. They wouldn't come in after the work had been done, the crews?

A. They might have come in, checked in the amount of hours they worked.

Q. Well, that was the foreman's job, to keep track of the hours they worked?

A. Sometimes they worked a little overtime, up in the morning. They would come in to give their overtime to us.

Q. Well, when they would work overtime, that overtime would carry them past the hour at which you and Gibson would quit work, wouldn't it?

A. It could be.

Q. And if the crews had been called out at night to do snow shoveling work, they would come in and report the first thing in the morning?

A. Yes.

Q. Now, there was a janitor who did the clean-up work at building 100, was there not?

A. That's right.

Q. He would clean up the building in the morning
63 before you reported for work at eight o'clock?

A. That's right.

Q. And he would come back again in the afternoon shortly before his eight-hour tour of duty was over, and he would sweep out the building again?

A. At times.

Q. Well, that was his regular assignment, to come in twice a day?

A. That was his assignment, that's right.

Q. And he customarily came in twice a day, didn't he?

A. No, sir.

Q. How frequently would he miss coming in twice a day?

A. I would say he missed about twice a week, just come in once a day.

Q. When he came in only once a day, would he come in in the morning or in the afternoon?

A. In the morning.

Q. And when would he come in in the morning, if you know?

A. I believe I saw him around there sometimes around ten o'clock, eleven o'clock.

Q. Now, except for the hours that you or Gibson
64 might work overtime, was there any other activity that was conducted in building 100 after 4:30 in the afternoon?

A. No, sir.

Q. The only time that any employees were working there at night, then, was on this one night twice a month that you and Gibson would work overtime?

A. That's right.

Q. Now, do you have any present recollection as to whether or not on this day toward the end of the first payroll period in December, when you and Gibson worked overtime, the janitor came in twice?

A. I could not tell you.

Q. Or only once that day?

A. I couldn't say.

Q. So far as that particular day is concerned, do you have any recollection as to how many new applicants for work there were that day, if any?

A. I don't know whether we signed some up, or not.

Q. Do you know whether or not anyone, other than yourself and Gibson, ate lunch in building 100 that day?

A. No, sir, I couldn't say.

65 Q. Do you have any recollection as to whether or not there were any of the snow shoveling crews in building 100 that day?

A. No, sir.

Q. Do you have any recollection whether or not anyone

other than Gibson sat down at Gibson's desk at any time during that day?

A. Whether anybody else sat at his desk that day?

Q. Yes.

A. I can't remember.

Q. Now, you spoke of the condition of the floor being dirty that night. There wasn't anything about the condition of the floor being dirty that night that was any different than would normally be found at the end of eight hours of work in that building, was there?

A. Yes, sir.

Q. What was there different?

A. After eight hours of work, the men tramped in there, signed their sheets, and went home, that place got dirty.

Q. Well, now, how many men would there be come in?

A. Foremen, truck drivers.

Q. How many foremen?

A. I couldn't say exactly how many; maybe three
66 or four.

Q. How many truck drivers?

A. Maybe two or three.

Q. That was the number that came in every night to sign out in that building?

A. That's right. Every night that floor was dirty.

Q. There wasn't anything about the floor this particular night that was any different from any other night?

A. Let me put it this way to you: Mr. Bagoff came in there to clean the floor off at two o'clock in the afternoon. At 4:30 or 5 o'clock that floor was dirty, after the boys came and tramped in.

Q. Now, Mr. Marjanian, I want to know about this particular night, December 12th or 13th. There isn't anything now that you recall about that day as being any different than any other day that you worked there in that building, is there, so far as the condition of the floor is concerned?

A. I don't remember if it was, or not.

Q. Do you have any recollection as to whether or not on that particular day either you or Gibson had gone out into the yard to make any field checks?

67 A. I believe I had.

Q. Now, do you mean that you have a recollection that you went out that day?

A. That's right.

Q. Do you have any recollection whether Mr. Gibson went out that day?

A. I believe he did, too.

Q. Did you make one or two trips out?

A. Maybe one or two, I don't know.

Q. How many trips did he make?

A. About the same, I think.

Q. Do you have any recollection as to what the weather conditions were that day?

A. It was cold.

Q. Do you have any recollection as to whether or not it was snowing?

A. No.

Q. You mean by that that it wasn't snowing, or you have no recollection?

A. I don't believe that there was any snow at all.

Q. No snow at all on the ground?

A. I don't think so.

Q. Now, the ground out there in Kirk Yard, the surface of the ground is covered generally with cinders,
68 isn't it?

A. Correct.

Q. And there is a roadway that leads by building 100?

A. Correct.

Q. And as you were going from place to place throughout the yard, that would be the way that you would travel, over established roads or paths?

A. That's right.

Q. Do you have any recollection as to whether or not it was wet out that day?

A. I don't think so.

Q. Now, whose suggestion was it that the adding machine be placed under the desk?

A. Mine.

Q. And how many times previous to this particular occasion had either you or Gibson put an adding machine under that desk?

A. I would say we had put it under the desk about four or five times before.

Q. In other words, at four or five previous pay-days?

A. That's right.

Q. At the time that you and Gibson left that night,
69 had you both finished your respective payrolls?

A. I wasn't; I didn't finish mine.

Q. Had Mr. Gibson finished his?

A. I believe he had.

Q. And his adding machine had already been put in his car?

A. Had already been put in his car? No, sir.

Q. Was it put in his car later?

A. After the accident.

Q. Where was that adding machine at the time that he was putting the other machine under the desk?

A. Sitting on top of my desk, I believe.

Q. Was the adding machine which he was putting under the desk the one that he had been using or the one that you had been using?

A. The one I had been using.

Q. Where had Gibson been using an adding machine that night?

A. Where?

Q. Yes.

A. At his desk.

Q. And had he then moved his adding machine from his desk to your desk?

A. That's right.

70 Q. And then he took the adding machine from your desk and started to put it--

A. I handed mine from my desk to his desk.

Q. Had you had any orders or instructions from any superior in the Railroad Company to keep the adding machines under a desk?

A. No, sir.

Q. That was strictly your own idea?

A. That's right.

Q. So far as you know, did anyone superior to you in the Railroad Company's organization know that the adding machine was being put under the desk at night?

A. I don't know whether they did, or not. I believe Mr. Schramm knew about it; I don't know.

Q. Well, did you work under Mr. Schramm?

A. No, sir.

Q. Where were the electric light fixtures in the building?

A. I believe in the B. & B. Department. You are talking about the main switch?

Q. No. Where were the light bulbs?

A. Oh; I think they were on the south side and north side of the room.

71 Q. And did they hang down from the ceiling?

A. No, sir.
Q. They were in the ceiling?
A. Right.
Q. Do you know what size bulbs were in those lights?
A. I couldn't say; they could be 100; they could be 60; I don't know.
Q. Do you remember, Mr. Marjanian, that in November, 1953, on November 28, to be exact, you gave a statement to Mr. Adkins of the Claim Department of the E. J. & E. about this occurrence?
A. That's right.
Q. That was in the office of the Division Claim Agent of the E. J. & E. at Gary?
A. That's right.
Q. That statement was taken down on a record, was it not?
A. That's right.
Q. And after the record had been started and you had identified yourself by your name and address and Social Security number, that part of the record was played back, was it not?
A. That's right.
72 Q. Do you recall that at that time Mr. Adkins asked you this question, and you made this answer:
Question, "Well, how many times did the janitor clean it (referring to the floor) a day, do you know?"
And you answered, "Twice a day."
And he then said, "Twice a day; once in the morning and once right after noon?"
And you answered, "Thats right."
Do you remember being asked those questions and making those answers?
A. Yes, sir, I did. At that time I was favoring the Railroad. I didn't care about anything. Right now I am under oath and I am going to tell the truth.
Q. Didn't you tell the truth at that time when Mr. Adkins was taking your statement?
A. No, sir.
Q. What was your reason for not telling the truth at that time?
A. Because I already gave my statement to Mr. Waitkus.
Q. Well, why at the time that Mr. Adkins was taking this statement from you on December 28, 1953, did you decide not to tell the truth?

73 A. Because at that time I didn't care about anything. I just wanted to get out of there.

How would you have felt if you walked into a place—I had intentions to go back to work at the E. J. & E. I walked in there; just as soon as I walked into the room they started questioning me.

Q. Well, then, you didn't care whether you were telling the truth then, or not?

A. I favored the Railroad at that time, but right now I am under oath and I am going to tell the truth.

Q. What was your motive in lying about it then?

A. I try to be as honest as I can. I wasn't trying to lie, or anything like that.

Q. But you just didn't care?

A. Well, the question was brought up to me; I just answered the best way I can; I was nervous.

Q. That was two years ago, wasn't it?

A. I believe so.

Q. That was two years closer in time to the time of this occurrence than today?

A. Yes, sir.

Q. Was your recollection better at that time than it is now?

A. Oh, no; I have thought about a little more, and
74 things started coming to me a little better.

Q. When was it that you gave the statement to Mr. Waitkus?

A. Oh, before I came to your office.

Q. Before you came into Mr. Adkins' office?

A. That's right.

Q. How long before then?

A. I don't remember.

Q. Have you read that statement in preparation for taking the witness stand here today?

A. What do you mean?

Q. Have you seen that statement at any time since you gave it to Mr. Waitkus?

A. Have I seen it?

Q. Yes.

A. I think I went over it once more before, yes.

Q. When was it that you went over that statement?

A. I think it was last year.

Q. Did you go over that statement at any time within the last week, before coming here to court today?

A. I don't remember; I don't think so.

Q. Now, your deposition was taken in Mr. Waitkus' office on August 27, 1955, was it not?

75

A. Yes.

Q. Had you read the statement that you had given to Mr. Waitkus at any time within several days prior to the time that your deposition was taken?

A. Did I give him any statement before that?

Q. No; did you read the statement that you had given?

A. No.

Q. Do you recall that Mr. Adkins, on November 28, 1953, asked you this question:

Question, "Did this janitor keep that building in good shape?"

And your answer, "Yes, at the time I was there, he did."

Were you asked that question, and did you make that answer?

A. Yes.

Q. Was that answer true at the time you made it?

A. No.

Q. Were you asked this question, "Your recollection is he swept it up twice a day?"

And you answered, "At times I saw him sweep up in the morning and in the evening."

76

Were you asked that question, and did you make that answer?

A. Yes.

Q. Was that true at the time that you made it?

A. I don't think so.

Q. Were you asked this question: "Well, do you know whether he swept it out that afternoon, or not?"

And you answered, "The time he always came in and swept out was around two o'clock."

Were you asked that question, and did you make that answer?

A. Yes.

Q. Was that answer true at the time you made it, or not?

A. I don't remember whether it was true, or not.

Q. Were you asked this question by Mr. Adkins: "Well, now, on this particular night, did you examine the floor over there by Mr. Gibson's desk after he bumped his head?"

And you answered, "No, I didn't."

Were you asked that question, and did you make that answer?

A. I don't remember.

77 Q. You don't remember whether you made that answer?

A. I don't remember now.

Q. What is the fact as to whether or not you examined the floor over by Mr. Gibson's desk that night?

A. I don't think I did examine the floor.

Q. By the way, did you go over to Mr. Gibson's desk after he claimed to have bumped his head?

A. No. I went right straight outside and started the car.

Q. Were you asked this question, and did you make this answer:

Question, "He didn't tell you about how it happened, did he say anything to you at any time about having slipped because of ice or snow or pebbles that caused him to strike his head?"

You said, "At that very time?"

And he said, "Yes".

Answer, "I would say I don't know."

Were you asked that question, and did you make that answer?

A. I was asked that question.

Q. And was that answer true at the time that you made it, or not?

78 A. I don't remember.

Q. Were you asked this question, and did you make this answer:

Question, "Did he ever tell you about that part afterward?"

And you answered, "He never complained to me, until about a week later, he started hollering about his head and stuff like that.

Were you asked that question, and did you make that answer?

A. The question was asked. I don't remember how I answered it.

Q. As I understand, you say the question was asked, but you don't remember how you answered it?

A. Yes.

The Court: We will take a five-minute recess.

(A short recess was taken.)

By Mr. Hackbert:

Q. Mr. Marjanian, do you remember that Mr. Adkins asked you this question, and that you made this answer: Question, "Well, have you ever seen, George, have you ever seen snow, ice, grease, or pebbles, or anything in 79 Vern Gibson's corner?"

And you answered, "Well, I'd say a little dirt, but anybody could tramp dirt there by walking, but I didn't see no pebbles or grease or anything."

Were you asked that question, and did you make that answer?

A. Yes.

Q. Prior to the time of this occurrence at the end of the first payroll period in December, 1951, had Mr. Gibson ever complained to you about his back or his leg or having headaches?

A. I think once or twice he mentioned about a headache; that's about all I know.

Q. He mentioned having headaches a couple of times a week, didn't he?

A. I don't remember.

Q. He was telling you about how he was taking vitamin pills, he told you that, didn't he?

A. Yes.

Q. You knew that in addition to his job at the E. J. & E., he also was connected with or owned a health food concern at Gary?

A. That's right.

Q. And he told you about the health food products 80 that he made, and how he was taking them himself?

A. Correct.

Q. Do you remember prior to the time of this particular occurrence, toward the end of the first payroll period in December, that you noticed him limping and being unable to get around in the field like a normal individual?

A. He got around. I don't remember about him limping.

Q. You remember that he had had another accident when he fell in the yard, hadn't he?

A. I don't remember that.

Q. Do you remember his falling against a rail out in the yard, his telling you about that?

A. No, sir.

Q. Do you remember saying this to Mr. Adkins: "You

could look up Ted Moore and he'll tell you the same thing that I've told you, that this man was sick."

Question, "He was sick when he came?"

Answer, "I think he was because he was in a poor condition. He couldn't barely walk out into the field to check his men. He had a hard time getting out there."

81 Do you remember being asked that question, and making that statement and answer to Mr. Adkins?

A. I don't remember that.

Q. Do you remember being asked this question and making this answer:

Question, "You say he had headaches before this accident?"

You answered, "He did, and Mr. Schramm could tell you that, too."

Were you asked that question, and did you make that answer to Mr. Adkins?

A. Correct.

Q. Were you asked this question, "Well, how frequently, once a week?"

Answer, "About twice a week."

Were you asked that question, and did you make that answer?

A. Correct.

Q. Were you asked this question, "About twice a week. Were they bad headaches?"

Answer, "Pretty bad. He was always complaining about it. I never see a man complain more than he did."

Were you asked those questions, and did you make

82 those answers to Mr. Adkins?

A. I don't remember that.

Q. What is the fact as to whether or not Gibson was complaining of headaches about twice a week during the period of time prior to December, 1951?

A. I don't know.

Q. Do you remember that toward the close of the statement you said to Mr. Adkins, "What I have told you is the truth, so that's it"?

Did you tell him that at that time?

A. I think I did.

Q. Do you remember that almost at the end of the statement he asked you this question, and you made this answer:

Question, "What you have told us is true and correct, to the best of your knowledge?"

Answer, "I'll swear on two bibles."

Did you make that answer to that question?

A. I don't remember saying it.

Q. Do you remember that you were then asked this question, and you made this answer:

Question, "It covers everything you can think of now?"

And you answered, "I'll take an oath on it."

83 Were you asked that question, and did you make that answer?

A. I don't remember that, either.

Q. Do you remember Mr. Adkins asking you this question:

Question, "Well, now, George, is there anything else I haven't asked you? I have gone into detail as much as I know how. Is there anything I haven't asked you that you can add to it and tell us about that might throw any additional light on it?"

Answer, "Well, I look at it this way. Vern had his accident here, he claims he did. Like everybody else could tell you, Vern was a sick man when he was here. I would say he was and I would verify that to anybody; he was sick."

Question, "Before he had this accident?"

Answer, "When he had this job. All the fellows in the office here used to kid Vern about it, and Vern did lose some weight here."

Question, "Before this accident?"

Answer, "That's right. He was limping, and I occasionally mentioned it to Vern, to take out insurance in

84 case he should get hurt or anything like that. He kept telling me he had a lot of bills, that his business wasn't going too good, if he did kick off. And a lot of times Vern did come to work with a headache. I'm not trying to help your end, but I also try to help anybody out. I'll tell you the truth, like I'm telling you now. Vern—"

And then the rest of it is a matter of opinion on your part.

Were you asked those questions, and did you make those answers to Mr. Adkins?

A. I don't remember saying that.

Q. You don't remember a thing?

A. I could have said it, probably, but I don't remember it.

Q. You wouldn't say that you didn't say it?

A. No.

Q. Do you recall whether or not on the day that you worked overtime in the first part of December, 1951, either you or Gibson took any telephone messages for anybody else?

A. We could have.

Q. But you don't have any specific recollection?

A. No.

85 Q. How frequently would you have to take telephone messages for any of the foremen?

A. Not too often.

Q. Would you say as often as once a week?

A. More than that.

Q. How many times a week?

A. I would say three or four or five, maybe.

Q. That would just be a matter of relaying information from someone, some other department, to one of the foremen?

A. That's right.

Q. That was simply as a matter of convenience?

A. Right.

Q. Your office was the telephone that was closest to the place, to the area in the yards where the foreman was working?

A. That's right.

Q. Would you go out to deliver those messages, or would you wait until the foreman came in?

A. Most times I went out.

Q. Do you have any recollection whether either you or Gibson went out to deliver any messages this particular day?

A. I don't remember.

86 Q. On the day that you and Gibson knew the payrolls were due, and that you would be working overtime that night, it was your practice, wasn't it, to spend as much time at your desk as you could that day?

A. It was practical, did you say?

Q. You tried to put in as much time working on the payrolls during the regular eight-hour day as you could?

A. Yes, that's right.

Q. You wouldn't make any unnecessary trips out into the yard?

A. Not unless I was called to go out.

Q. Unless you were specifically directed to go out into the yard that day, your practice was to stay there and work on your reports?

A. Yes, that's right.
Q. And you had done that that day, hadn't you?
A. I couldn't say whether I did, or not.
Q. So far as you can recall, there wasn't anybody else who used Gibson's desk that day except Gibson himself?
A. It could be.
Q. And Gibson's desk was so located that there
87 was no way, when he was sitting at the desk, for anyone else to walk around him, behind him, was there?
A. Unless he was signing up gandies.
Q. What's that?
A. Unless he was signing up men, new men.
Q. If he was signing up a new man, that new man would be out here in front of his desk, wouldn't he?
A. Sometimes they crowded around his desk.
Q. Do you have any recollection as to whether or not any new men were employed on that day that you worked overtime?
A. I don't remember, sir.
Q. So that you don't remember whether or not there were any gandies crowding around Gibsons desk that day?
A. No, I don't remember.
Q. And of course when those men came in, those new applicants for employment, they hadn't worked any place that day yet, had they?
A. No.
Q. Where was the office where they were hired?
A. On Buchanan Street.
Q. And that was how far away from building 100?
A. About three blocks.
88 Q. And there was what kind of a roadway leading from that place of employment to building 100?
A. A dirt road.
Q. A cinder road?
A. No, it was dirt.
Q. A dirt road?
A. That's right.
Q. And on that particular day, it was neither snowing nor wet out?
A. I don't think so.
Q. Was it a cold enough day to be freezing?
A. It was cold that night when I worked.
Q. Was it below freezing, do you recall?
A. No.

Q. Do you mean you don't recall, or that it wasn't below freezing?

A. No—you are talking about below zero?

Q. Not below zero, but below 32 above zero.

A. I don't remember whether it was, or not.

Q. And from 4:30 on there had been no one come into that building, and there was no one in that building other than you and Mr. Gibson?

A. Correct.

Q. What time was it that this happened?

A. Closing time, around 8:30.

89 Q. Around 8:30. That building was steam heated, was it not?

A. Correct.

Q. And there were heating pipes along the south wall of the building right back of Gibson's desk?

A. Correct.

Q. And the heat was on that night?

A. I couldn't say whether it was, or not.

Q. It had been on during the day?

A. It was on during the day.

Mr. Hackbert: I think that is all.

Redirect Examination by Mr. Waitkus.

Q. You gave me a statement shortly after Mr. Gibson got out of the hospital; is that true?

A. Correct.

Q. I will ask you if you recognize that signature.

A. It is mine.

Q. That is your signature?

A. Yes.

Q. Take a look at this page. Is that your signature, also?

A. That is mine.

90 Q. Will you read over those statements?

A. My name is George—

Q. No, I meant—well, go ahead.

Mr. Peters: I object to it. It is hearsay.

Mr. Waitkus: Are you objecting to it?

Mr. Peters: Why, certainly; it is hearsay, it wouldn't be competent.

By Mr. Waitkus:

Q. Read it to yourself.

A. Do you want me to read all of this?

Q. Yes; read it to yourself.

Did you give me this statement on December 4, 1952?

A. Correct.

Q. And the facts that you gave me there at that time, were they true at that time?

A. Correct.

Q. Are they true today?

A. Correct.

Q. Did you tell the gentleman who took your statement in November, of '53, that you had given me a statement?

A. Correct.

91 Q. Did you tell me at that time that you lived at 1125 Harrison Boulevard, Gary, Indiana?

A. That's right; correct.

Q. Did you tell me at that time that in September, of '51, you were employed as a timekeeper by the Elgin, Joliet and Eastern Railroad Company, located at Kirk Yard, working out of building 100?

A. That's right.

Q. Did you tell me then than Vern Gibson worked with you as a timekeeper also?

A. Yes.

Mr. Hackbert: If the Court please, if the purpose of this line of questioning is to get the statement in verbatim, or to get its contents in, I object to it. You can't corroborate a witness by a statement that he has given. You can impeach him with a contrary statement, but you can't corroboate him with a consistent statement.

Mr. Waitkus: As far as we are concerned, your Honor, this is a surprise to us. We have a statement that this man signed, and I want to ask him—

92 The Court: Well, I think that the proposition of law that Mr. Hackbert stated is substantially what the law of evidence is, that a statement made by a witness, a previous statement made by him, whether oral or written, can only be put in if it tends to be contradictory, and not in support of his testimony.

Mr. Waitkus: Well, we are going to ask that the statement be admitted in evidence, and the Court can rule on it.

(Said instrument, consisting of two pages, was marked Plaintiff's Exhibit 7-A and 7-B for identification.)

Mr. Hackbert: You are offering it?

Mr. Waitkus: Yes.

Mr. Hackbert: I object, if the Court please, for t reasons I just stated.

The Court: Sustained.

By Mr. Waitkus:

Q. Mr. Marjanian, I understood you to say that y gave them a statement on November 28, 1953, to M Adkins?

A. I didn't give them a statement; they took

93 recording of me.

Q. How did it happen that you went up there their department?

A. I believe Mr. Wright called me up there. I ha intentions of going back there to see about a job. I did know I was going to be questioned.

Q. Who had suggested that you were going to go ba there to get a job?

A. At that time they called my mother's house, a my mother told me that they mentioned about a job.

Q. Did she mention who called?

A. I don't know. Maybe she mentioned Kinzel or L Govert; I don't know.

Q. And it was with that idea that you went over ther

A. That's right.

Q. How long were you in this office?

A. I believe I went there in the afternoon, right aft noon; I think I got out of there, it was about three o'cloc I don't know, I couldn't say; it could be in the morni it has been about three and a half years; I don't remembe

Q. Would you say that you were up there about thr hours?

94 A. No.

Q. Two hours?

A. Might have been two.

Q. Who else was present, do you recall?

A. Mr. Kinzel was there part of the time; he lef Mr. Wright was there; and I don't remember the oth gentlemen.

Q. Was Mr. Kinzel your former boss?

A. Yes.

Q. Can you tell us how they operated this machin whether it was going on all of the time?

A. I couldn't say.

Q. Well, did you talk to them at a time when the machine wasn't running?

A. I think they kept asking me one question after another, and I just answered to the best of my ability. Like I say, I was nervous; I didn't care at that time. I came down there with the intention that I was going to get a new job, or something like that, but they rushed me in this room and they kept asking me questions.

Q. In other words, you were cooperating with them because you thought you were going to get a job?

A. That's right.

Q. Did you mention to them at that time that Mr. Gibson had bumped his head on the desk when he was putting the adding machine away?

A. Yes, they asked me questions on that.

Q. Did you tell them about it?

A. Yes.

Q. Now, Mr. Marjanian, on the 27th of August, 1955, you also gave a sworn deposition before a reporter, did you not?

A. That is true.

Q. And Mr. Hackbert was there at that time?

A. That is true.

Q. And Mr. Peters?

A. That is true.

Q. And in this deposition, your testimony was essentially the same as you gave on direct examination today, was it not?

Mr. Hackbert: I object to that, if the Court please. You can't corroborate a witness with that, either.

The Court: Sustained.

By Mr. Waitkus:

Q. Can you tell us who all were present at the time you went into the office?

A. I don't remember.

Q. Was there more than one fellow in there?

A. Yes.

Q. More than two fellows?

A. There was more than two.

Q. Were there more than three fellows?

A. Maybe four or five; I don't remember.

Q. Maybe four or five fellows. Did they talk to you first about this case?

A. No. Mr. Adkins kept asking me if it was all right

to have the recorder on. I told him I didn't object. And then he started in there to ask me my name, and one question led to another; and I kept answering them right back.

Q. Was the machine in front of you, do you know?

A. No, sir.

Q. It was to your back, or side?

A. It was right next to Mr. Adkins.

Q. Do you know who was operating that machine?

A. No, sir.

Q. Do you know whether the machine was working at all times when you made these answers, or not?

A. I suppose it was; I don't know; I mean it could be.

Q. You had never seen that type of machine before?

97 A. No, sir.

Q. Isn't it a fact, Mr. Marjanian, that you didn't know anything about Mr. Gibson's falling against a rail?

A. No, I didn't. I didn't hear anything about Gibson's falling against a rail.

Q. Well, Mr. Hackbert asked some questions about when he fell against a rail. Did he ever fall against a rail?

A. At the time I was there?

Q. At the time you were there?

A. I don't recall.

Q. As a matter of fact, did he ever tell you that he had skinned his shin back in March, of '51, when he first started working there?

A. No, sir.

Q. You weren't working there at that time?

A. No, sir.

Q. Mr. Marjanian, how long before you gave this statement to Mr. Adkins were you married?

A. Not too long after that.

Q. Was it before or after that? Let me ask you, when were you married?

A. I was married August 1, 1953.

98 Mr. Waitkus: That is all.

Recross Examination by Mr. Hackbert.

Q. Just one question: Do I understand that your present testimony is that at the time you gave this statement to Mr. Adkins you were willing to tell something that wasn't the truth because you thought it might help you to get a job?

A. I thought it might.

Mr. Hackbert: That is all.

Redirect Examination by Mr. Waitkus.

Q. Did anybody indicate to you that you should cooperate with the Railroad, and if you did, you would get a job?

A. No, sir.

Q. You tell us now that the reason why you did give this type of statement was because you thought you would go back to work for the E. J. & E. as a timekeeper?

A. I thought they might call me back; that by favoring my statement with them I would have a good chance.

Q. Tell me, were some of the other fellows that were in this meeting at that time some of the fellows you worked with before?

A. At this meeting when they questioned me, that worked with me before?

Q. Yes.

A. Mr. Kinzel was all that I knew.

Q. He was your former boss?

A. Yes.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

The Court: Because of the hour, I don't think we should start with another witness. We will take an adjournment until ten o'clock tomorrow morning. Keeping in mind all of the admonitions that were given to you previously, we will adjourn until ten o'clock tomorrow morning.

(And thereupon a recess was taken until Tuesday morning, September 20, 1955, at ten o'clock.)

100 And on Tuesday morning, September 20, 1955, at ten o'clock, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: You may proceed.

CLAIRON VERN GIBSON, plaintiff in said cause of action, and a witness in his own behalf, having first been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. Will you state your name to the Court and jury?
A. Clairon Vern Gibson.
Q. Try to speak loud enough so that the juror at the end of the jury box can hear you.
Where do you live, Mr. Gibson?
A. 312 Chase Street.
Q. That is Gary, Indiana?
A. Gary, Indiana.
Q. Are you married?
A. Yes, sir.
Q. You are the plaintiff in this case of Clairon Vern Gibson against the Elgin, Joliet and Eastern Railway
101 Company?
A. Yes, sir.
Q. When were you employed by the Elgin, Joliet and Eastern Railway Company?
A. About February 14, of '51.
Q. 1951.
A. 1951.
Q. In what capacity were you employed by them?
A. As timekeeper.
Q. When you started with them as timekeeper, on what section of the E. J & E did you start working?
A. I started working in Kirk Yard, but I was assigned to a traveling car that was stationed at the west end of Kirk Yard on a spur track to help put up the hump.
Q. What were your duties in connection with that?
A. It was to sign in new men, keep their time, keep

the distribution of any material used on the foreman's work and the upkeep of the track or whenever he worked on the hump itself.

Q. Now, how long did you stay at that spot, to the rolling car, as you called it?

A. Well, I can't remember just how long I stayed there.

Q. Well, approximately, if you can tell us.

102 A. Maybe two or three weeks. I was bumped off of there almost immediately by some fellow out of the Joliet office. And then I had to go down to another traveling car, rolling car, work car, that had come in off of the right-of-ways, and they were stationary for the hump maintenance and putting up the hump; I was put on that job, and then I bid for that position.

Q. Did you ever work out of what has been referred to as building number 100 in Kirk Yard?

A. Yes.

Q. When did you start working out of building number 100?

A. It seems like I started working there, it might have been about the middle of March; I don't know.

Q. Of 1951?

A. Yes. I went down there and was going to relieve Harley Dowell, who went into distribution work out of the accounting office, and I was taking his position in building 100, but I only just nicely got started there when this timekeeper that bumped me off of the first job that I had at Kirk Yard for the E. J. & E. went back to Joliet on
103 some other job that he bid for at the last minute, and so they put me back on that job until they could get another timekeeper to come in, and I had to break that timekeeper in, which was Ted Moore; and I had to break him in before I could go down on my regular job that I had been appointed to at building 100.

Q. Now, what were your duties working out of building 100 as a timekeeper?

A. Well, they consisted of other things besides timekeeping.

Q. Tell us about your timekeeping first, who did you keep time for?

A. That was keeping time of the gandies or railroad workers on the maintenance of the rails, upkeep of the rails; I had to keep their time, and in doing that, that took in all of any accidents that came in; I had to make

out the accident slip, so that they could get the gandy to the hospital for examination or aid; and then after they came back I had to make out a detailed report on how it happened, what time it happened, where it happened and so on. Then I had a monthly distribution sheet that I had to make out for any materials used in main-
104 taining the upkeep of the tracks and right-of-ways, main lines, or wherever the section foremen were working with their crews, and in that keeping of the materials would be the use of ties, creosoted ties. There was where a lot of injuries came in. It wasn't exactly an injury; it was a burn from the creosote, unloading the ties from the gondola cars in between tracks; and mostly they had it on their ankles or their arms, whenever the ties came in contact with their body. And then I had to keep track of the rail used, of the tie plates or spikes, the amount used. And, of course, the different hours were divided up by the foreman of the men at the bottom under the distribution of the time for certain jobs.

And on that work, when I went down to building 10, Harley Dowell was so heavily loaded with work that he could only get his payrolls out and other things that the office would call for and have to get out immediately, and then he would try to satisfy the accounting division by getting out those things that they had to have at the mo-
ment, because they were asked evidently from the
105 Joliet office, why they weren't there, so then he would get those out; and others were derailment reports that were piled up there, and Jake Strauss from the same building, the building the accounting department was in, would call up for these reports, and why weren't they in here this is a month or two old and it should have been in almost immediately after derailment; and so then Harley would get those out. So that's why, when I got down there, there was all this work that was piled up, and I had to do that besides the work that I was supposed to when I was assigned; when I got there, I had that back work. I was almost two weeks of working overtime at the office and then taking this work home and trying to catch it up, as well as keeping up my daily work.

Q. In checking the time of these track workers, would you have to go out onto the track or into the field, as you call it, to see whether they were putting in their time?

A. Yes. We were ordered to do that twice a day, morn-

ing and afternoon. We had to check the men to find out if they were on the job. Sometimes the men were not on the job, and we would have to find out where they
106 were, and we would go to the foreman and find out why such and such a number was not there, because he had reported him in that morning or on his report that they were working, because we would check the men first, and then we would go to the foreman, and he kept the numbers as they went out to work that morning. I checked with him, and would find out the men that I had spotted, and the numbers that I had not spotted, and he would show them working, and I wouldn't show them there, so then we would find out where the man was, and if the man could not be found, to explain why he wasn't on the job, then he was docked to the last time seen on the job.

Q. Where would these laborers or section gangs work, on what tracks would they work?

A. Well, they worked on various tracks, wherever the call for them came from in the morning by the track supervisor. He would designate the work for each foreman.

Now, not only was the hump being built there, but the maintenance of the yard itself had to be kept up at times, wherever it was called for, and therefore there was dif-
107 ferent men that had different work to do, and when they were caught up with the work, then they were used on the hump until such time as they were placed elsewhere.

Q. Well, were there a number of different tracks that ran in and out of Kirk Yard, ended up at different places?

A. Well, at the east end of the field was the main track going over Buchanan Street into the United States Steel Mill, and then there were workers over there as well.

The Court: What you are asking for is whether they went in other directions?

Mr. Waitkus: I am going to ask him as to where, the particular states in which they operated.

A. (Continuing.) We done the same type of work there, but that was for blast furnaces, furring, and so on, and so forth.

By Mr. Waitkus:

Q. Mr. Gibson, what I was referring to, did these tracks that you worked on lead between the states of Illinois and Indiana?

108 A. Yes. That was at the west, at the west end of the field, and they would lead—

The Court: Wait until he asks another question.

By Mr. Waitkus:

Q. On these tracks that led between Illinois and Indiana, was there any freight handled on there or any kind of merchandise?

A. Well, all of the output from the United States Steel came up on the hump. Until the hump was completed, they would come up on another line beside the hump and were switched on different tracks, and the train was made up, and then the engines were called out and they hauled them out onto the main lines, which could have led east and west, and north and south.

Q. Well, in other words, some of this output from the U. S. Steel would come through Kirk Yard and then would come out to the main line, where it would be taken to Illinois?

A. Yes. It could even be taken into South Chicago.

Q. Well, South Chicago is in Illinois?

A. And that's in Illinois.

Q. In other words, some of these tracks led to dif-
109 ferent parts of Illinois, do I understand?

A. Yes.

Q. Besides South Chicago, what other parts of Illinois would these tracks go to?

The Court: Where did the E.J. & E. go to, besides South Chicago?

A. Well, they had tracks down into Joliet, down in through Joliet; they had tracks going—I don't know where they went; I know that they went through Indiana, they connected with the I.H.B., and they connected with other lines; they had spur lines going down and they picked up work material from Taylor Forge, and that material was shipped out from there or shipped in to them.

Q. In other words, the stuff that was shipped went through the Kirk Yard lines into different states, in commerce in different states?

A. So far as I know. That's all I know about that.

Q. Well, in other words, you never rode the lines themselves to these different points out of the state?

A. No, but I had to keep time on emergency work that was performed on that in Illinois. The fellow
110 that was the section foreman and his crew that were

in Indiana Harbor had to work out leading in towards South Chicago or in to the Illinois state line. As to whether he went beyond that line, or not, I don't know, the state line, because then it seems like the South Chicago should have met up about there.

Q. In other words, these section crews you kept time for and checked on the job worked in Kirk Yard and also out on the main lines, then?

A. Yes, sir.

Q. In addition to checking on these crews, were there any other men that you kept time on the payroll for that were not track laborers?

A. Yes. That was out of the storeroom. They had supplies there I imagine for the plumbers—maybe for the plumbers, but for the garage men, I know that; they had supplies for the office; they had different sorts of supplies that might be needed, pencil sharpeners, light bulbs, different things like that, and we had to keep the time on these store men. Now, out of those store men, not all of them; we kept time on those loaned to the store-
111 room or store department, and they came from the section gangs, and they would be loaned to the storeroom, and then we had to carry them on a separate payroll under the store division, and have it divided up so it wouldn't show under the maintenance of way. There were two lawn-mower men.

The Court: Has he covered it?

By Mr. Waitkus:

Q. Let me ask this question: In addition to the store men, were there any other parties that you kept time on?

A. Yes, but I forget; I can't recollect if that was in '51 or '52. It seems like it was in '52, the Signal Corps men from Joliet, I had to keep track of their time, and any men loaned—I didn't keep track of the Signal Corps men from Joliet; I kept track of the men loaned to the Signal Corps from the section gang.

Q. Now, you say you had to check these men in the field twice a day?

A. Yes, that was the orders, twice a day.

Q. After you checked the men in the field, where would you then perform your duties?

A. In building 100; I had to go back to build-
112 ing 100.

Q. Can you describe the surroundings around build-

ing 100, the physical facts, outside of the building, for instance, whatever type of equipment that was around there?

A. Yes, at the west, about half a block west of building 100, was the garage where they did repair on the trucks and repair on the storeroom cars or any car that was given to any of the supervisors for their use on the job. And then the carpenter shop was to the north of building 100. The switchmen's building was to the east of building 100, as well as the ice shack, which was down across the track leading over towards the roundhouse, just below the switch shack. And a little bit to the south was a big tank; I don't know what that was, whether that was oil, or not; it must have been oil because there was a big trench around it so in case of fire it could be flooded. Then on the south, I think there was a big tank there, and they had pipes leading out of that tank, so that must have been some sort of an oil tank. Then just in a corner to the south of building 100 and to the west
113 of the switchmen's shanty and diagonally east, southeast, in that little corner there was a paint shop, from building 100. Then to the south—

The Court: How does this help us decide what happened?

Mr. Waitkus: What I am getting at, were there any tracks—

The Court: I am not suggesting, but it seems to me that unless you try to direct your questions to the witness so that he will know what you are getting at, you are going to get a lot of things in here that are not too important.

Mr. Waitkus: I am trying to keep away from leading questions, your Honor. On the other hand, I want him to tell—

The Court: Well, if you see that he is not getting what you are asking for, then stop him.

By Mr. Waitkus:

Q. Are there any tracks in this neighborhood, railroad tracks?

A. Yes; there was a caboose track, and that led—

The Court: It is answered. I would suggest, Mr.
114 Gibson, that we will get along a little better and faster if you only answer what the question asks for. What we want to do is, first, get all of the story

that is important; and, secondly, only that which is important. So I would suggest that you listen to the question and only answer that which is asked for. If it is not compiete, Mr. Waitkus will ask another question. I think we will get along a little faster by doing that. So just answer to the point, in other words, what he asks for.

Read the question.

(The question and answer were read.)

By Mr. Waitkus:

Q. Mr. Gibson, what time of day did you start your work as timekeeper?

A. Eight o'clock in the morning.

Q. And did you start working in the shanty known as building 100?

A. No, I couldn't start immediately at eight o'clock.

Q. What do you mean, you couldn't start immediately at eight o'clock?

115 A. Because the office where I was working, had my work to complete, was overcrowded by section foremen, truck drivers, oil burners, welders, sometimes an assistant to the foreman would come in, and they would have their work lined up for the day from the track supervisor, and I never had any time, in fact, I couldn't even squeeze in there to sit at my desk because there was always somebody sitting at my desk and in back of my desk.

Q. Did you also do any hiring, any checking in of new men in the morning out of shanty number 100?

The Court: Well, hiring and checking in would be two different things.

By Mr. Waitkus:

Q. Let me say, did you do any hiring in of new men in the morning in shanty 100?

A. In this case, in order to answer that question, in this case the men would come, report there to work, but they had been hired on the previous Sunday or Monday, in case Monday was a holiday.

Q. Well, would they be checked in then, in the morning?

A. Yes, they would be checked in, and we would assign them to different foremen as to the order for how

116 many men should be assigned to each crew, each foreman by the track supervisor.

Q. You say they would be hired in on a Sunday?

A. Yes, they would be shipped in, and we would have to sign the men up on a Sunday, and then they would board that night at the B. F. Brown boarding company, in Kirk Yard.

Q. Well, you didn't ordinarily work on Sundays, did you?

A. No, only unless notified.

Q. Who notified you to be there on Sunday?

A. Mr. Kinzel, in charge of the accounting department in Kirk Yard.

Q. And when would he notify you that you would have to work on Sundays?

A. He would notify us late Friday evening.

Q. He would notify you, I understand, late Friday evening to be there on Sunday to hire these new men that would be brought in?

A. Sunday or Monday.

The Court: Did you do the hiring, is that what you are saying, on Sunday or Monday?

The Witness: We assisted in the hiring; we didn't 117 hire; we assisted in taking the work record or the application which was required; and I think it was, if I remember right, it was 501-P—5001, and it had to do with their nationality and who their parents were, where they were born, and so and so.

By Mr. Waitkus:

Q. Well, Vern, I am interested now in these fellows that you say would be brought in on Sunday. Where would they be brought in from? I mean, give us some explanation as to where these fellows came from; how would they be brought in?

A. They would be ordered by the clerk for B. F. Brown, who was in charge of the boarding and feeding and sleeping of the men, quartering the men. There would be orders how many they were short and how many they needed.

The Court: Where did they come from?

The Witness: They came from the Chicago employment office.

By Mr. Waitkus:

Q. Well, did the E. J. & E. have a Chicago employment office?

A. Yes. I forget the name of the street.

118 Q. How would they be brought in?

A. They would be brought in by bus. They had a certain man that would drive the bus all the time.

Q. How many fellows would come in at one time?

A. Well, as many as the bus would load, or hold, and then there was two and three bus loads, so altogether there would be anywhere from 50 to 80, more or less, one way or the other.

Q. How long would it take you to check and hire these fellows on Sunday?

A. Well, we would be down there at eight o'clock in the morning, and we would stay until we got them all taken care of. And one night—

The Court: Well, that's enough.

By Mr. Waitkus:

Q. Now, you checked in these fellows, you took their applications. Can you tell us where most of them gave their addresses, what part of Chicago they were from?

The Court: What does that have to do with it?

Mr. Waitkus: Some of them have been rehired a number of times. I just wanted to show not only that they
119 had regular daily checking in, but these were extras that were brought in from certain parts of Chicago, and the type that they brought in, that there was an awful turnover, that the same group might work a short while, and then they would be back again. I will try to get to that.

The Court: Well, is that a fact, is that what happened?

Mr. Hackbert: Well, these track laborers are recruited in the west Madison area in Chicago to some extent. They are brought in by the Brown Company in buses and they are hired. They are intermittent workers; they work a while, then they quit, then they come back later.

The Court: Sometimes the same man will be hired in and quit, and be hired in and quit, at different times?

Mr. Hackbert: That's right.

The Court: With that statement—

Mr. Waitkus: I think that that will cover it. We will save that much time.

By Mr. Waitkus:

120 Q. Now, Mr. Gibson, did you have telephone service in this shanty number 100?

A. Yes, sir.

Q. And where did this phone service connect you with?

The Court: I wonder if that couldn't be stated, if it is a fact, where it went, and so forth.

Mr. Hackbert: Well, I don't personally know what the fact is.

By Mr. Waitkus:

Q. Let me ask you, did you have any direct line from Joliet and South Chicago?

A. Yes, sir.

Q. Did you at any time get any messages from the roadmaster of the E. J. & E.?

A. Yes, sir.

Q. What were you to do with these messages that you received from the roadmaster?

A. I was to pass them on to the track supervisor, and if he wasn't there, then my orders were to take them out to the closest foreman, to see that whatever the information from the track supervisor was given or taken care of.

121 The Court: Where was the roadmaster's office?

The Witness: The roadmaster's office—the acting roadmaster's office was in the same building the accounting office was in.

By Mr. Waitkus:

Q. Is there a head roadmaster, let me ask you that?

A. The regular roadmaster was Bob Dangremond.

The Court: Where did he have his office?

By Mr. Waitkus:

Q. You said you would have phone calls from Joliet and South Chicago. Who would phone in from South Chicago and Joliet?

A. I don't know who would phone in from South Chicago or Joliet; sometimes it was the track supervisor at South Chicago; other times it might be a switchman. And the same thing could happen from Joliet. Or it could be Mr. Gates, or his assistant, I can't recall his name at the moment; and he would call at times.

Q. Who was Mr. Gates?

A. He is in charge of accountants, I guess. I 122 know that he was Mr. Kinzel's supervisor.

Q. Now, these messages that you received, did they at any time force you to go out into the field to deliver these messages to the parties that they were for?

A. Yes; yes.

Q. And did you have any difficulty sometimes in getting these messages delivered?

A. Yes, because the track supervisor was not there, and we had to catch the closest foreman, and sometimes the closest foreman wouldn't be there, around building 100, and we would have to find him.

Q. Do they have a loud speaker system in and about the part of Kirk Yard known as the hump?

Mr. Hackbert: I think, if your Honor please, we are getting pretty far afield. I don't see how this has much bearing on whether he did or did not bump his head on coming out from under his desk.

The Court: I suppose it has to do with whether his work had relation to interstate commerce. As I understand it, that is an issue here.

Mr. Hackbert: Yes, that is an issue.

123 The Court: Are you talking about at the time that he worked there?

Mr. Waitkus: That's right, your Honor, at the time that he worked there.

The Court: How would that have to do with interstate commerce?

Mr. Waitkus: For this reason, your Honor: I understand that there were times when he could not find the party that the messages were for, and he would have to go to the tower and broadcast over the speaker.

The Court: Why don't you get right to it and ask him if that is what he did?

By Mr. Waitkus:

Q. Mr. Gibson, did you at any time go to the tower and ask them to broadcast for the acting roadmaster or the supervisor, that there were messages for them?

A. Yes, there was an emergency call came in one time and I couldn't find Bob Dangremond or Joe Schramm, which I was asked to do, and they called up again, and I said, "Well, I can't find them." And they said, "Well, find him. Whatever you do, find him." So I called up

124 the main tower, and asked them, due to this emergency call for Bob Dangremond or Joe Schramm, if they wouldn't broadcast over the loud speakers which were situated intermittently along Kirk Yard.

Q. Did you get any other type of emergency calls?

A. Yes, I got calls to have tail gates removed from

trains, work trains coming through, maybe off the main line down straight through into the Gary Mill, and the tail gate would fall off in between tracks, which could cause derailments, and I was told to get hold of the foreman or Joe Schramm, who was the track supervisor, and have that moved immediately.

Q. And you would do that, carry out those orders?

A. I would carry out those orders if the gopher was there to go for the foreman, the closest foreman, or the track supervisor, to notify them of the call that I had received.

Q. You mentioned "gopher." Can you tell us or explain was you mean by "gopher"? Perhaps the jury doesn't quite understand, when you use that term.

A. A gopher is the term used for a messenger that
125 is sent out into the field.

Q. Did you at any time go out into the field yourself with these emergency messages?

A. Yes, I had to, but I didn't have time to do that, so I used my Chevvy and had to go to the closest spot and then cross the tracks.

Q. You mean you used your own car at times to deliver these emergency messages?

A. Even to check my men, I had to use my car.

Q. How far from shanty 100 would you have to go on occasions of this sort?

A. Out beyond Clark Road; I can't tell you how many miles that is; that's beyond Clark Road, from Buchanan Street to Clark Road, and then I would go on down past where the E. J. & E. line runs, over the viaduct across the New York Central and possibly the B. & O., that goes down that way.

Q. Well, you did all this sort of duty in and through December, of 1951?

A. Yes, that was in 1951, and in 1952.

Q. Now, Mr. Gibson, when the section gangs or the men, different men, came into shanty number 100, would they drag in anything at any time?

A. Well, yes, because they cut across tracks, which
126 are full of cinders and grease and what not that are on the tracks. There's oil men, and grease men, sweepers, assigned by the foremen to do different duties in Kirk Yard, and especially on the switch points, to keep them moving easily.

The Court: The question was whether or not they brought anything into the shanty.

The Witness: Yes, and that's where it came from, sir.

By Mr. Waitkus:

Q. What different particles came into the shanty that were dragged in this way?

A. Well, whatever could be carried on the pants' cuffs of the legs from unloading cinder cars or aggregate cars, or off of their boots.

Q. Let me ask you directly, were any cinders, pebbles, grease, tar, things of that sort, ever brought in?

A. Oh, yes, yes; the shack was very dirty, because every time Tom Bagoff swept it off—he was the janitor—every time he swept it out, there was thick piles of dirt he had to take up off the floor.

Q. Was there any door mat in front of the door at 127 any time?

A. No.

Q. Was there any foot scraper of any kind?

A. No. It seems like when I first went to building 100, it seems like there was a wornout broken foot scraper hanging by one side on the left-hand side of the lower step as we entered building 100, but that didn't stay there very long. It was never replaced.

Q. Was there any there in December, 1951?

A. No, sir.

Q. Did you at any time request any of your superiors to furnish you with a door mat or foot scraper?

A. Yes, I asked Mr. Kinzel for that.

Q. What did Mr. Kinzel say?

A. Mr. Kinzel told me because the building would be torn down eventually he didn't feel that anything should be done about it at the time.

Q. Mr. Gibson, how late did you fellows usually work during the day, from 8 to what time?

A. 4:30.

Q. And would this shanty 100 then be locked for the evening, for the night?

A. When I left, I always locked the door.

128 Q. Were you always the last to leave?

A. Not always. Joe Schramm was generally the last one to leave, because he stayed longer than I did.

Q. Joe Schramm was the supervisor, track supervisor?

A. Yes, sir.

Q. Did he also have his office in the same building?

A. His desk was right straight across from my desk, backed up together.

Q. Who else officially used this building number 100 in addition to yourself and Mr. Schramm?

A. Mr. Dangremond.

Q. Mr. Dangremond is who?

A. Well, he was assistant to Mr. Shepley. He was the roadmaster.

Q. Let me ask you, was he the roadmaster, supervisor, or what was his position, Mr. Dangremond's?

A. Well, on the hiring—

The Court: What was his title?

By Mr. Waitkus:

Q. What was his title, was he the roadmaster, supervisor, or just what?

129 Mr. Hackbert: I will stipulate, if the Court please, that he was the roadmaster.

Mr. Waitkus: Vern, are you getting tired, would you like a recess?

The Witness: Yes.

The Court: We will take a couple of minutes out.

(A short recess was taken.)

Mr. Hackbert: If your Honor please, I would like to state a little more accurately than I did what Mr. Dangremond's position was. While his title was roadmaster, at this particular time his actual assignment was that of special assistant to the chief engineer, and he was the man immediately in charge of hump yard construction as an engineer.

The Court: All right; you may proceed.

By Mr. Waitkus:

Q. Mr. Gibson, did you and the other timekeeper get out the payroll reports to the front office?

A. Yes.

Q. Who would tell you when these payroll reports had to be in?

A. Mr. Kinzel or Leo Govert.

130 Q. When would they tell you as to the deadline, when the report had to be in?

A. Well, they never—they weren't able to notify us until they were notified from Joliet.

Q. Would they give you several days' notice?

A. No; no, we were sometimes notified maybe two days in advance, but as a rule a day in advance.

Q. And when you were notified to get these payroll sheets in, would that entail overtime on your part and the other timekeeper's part; I mean would you have to work past 4:30 to get those reports in?

A. I always worked past 4:30 to get those reports in, and that night—

Q. Just a minute. Did you have occasion to get a payroll report in for the first payroll, the first part of December, of 1951?

A. Yes.

Q. Can you tell us approximately what date that was that you were supposed to get those reports in, in December, 1951?

A. About the 13th.

Q. And would that mean that you would have to work either the evening before or that day, that evening,
131 one of those evenings, in order to get these reports in?

A. Yes. We had to turn them in the first thing the following morning, and I would have to work overtime that night in order to get it out, even be anywhere near turning it in the next morning.

Q. In payroll in this payroll report, just what did that payroll report show, did it show the time that each man put in for the preceding two weeks?

The Court: Do you have—

Mr. Hackbert: I have the original payroll here.

The Court: Can you stipulate what the information was? I think we could get it probably a little faster that way.

Mr. Hackbert: If your Honor please, I will produce them.

Mr. Waitkus: If you have them here, let's put them in.

The Court: One is a representative? You don't need to put them all in, I don't think, unless there is a purpose.

Mr. Hackbert: I think there is a purpose in putting them all in, if the Court please.

132 Mr. Waitkus: May I see them?

Mr. Hackbert: Yes.

The Court: Can you stipulate that those are for that period?

Mr. Hackbert: Q. Let me ask you this, by way of getting at it, Mr. Gibson, I have here payroll reports for the

first half of December, 1951, the first one consisting of one page, the foreman J. Hernandes, for the Indiana Harbor crew; the second, one page, the foreman is J. Rodriguez, for the Buffington, Indiana, crew; the third, consisting of six sheets, is for foreman C. Roop, R-o-o-p, in Kirk Yard; the fourth, consisting of five pages, is for foreman R. Flores, F-l-o-r-e-s, in Kirk Yard; the fifth, consisting of six pages, is for foreman H. Sullivan, in Kirk Yard; the sixth, consisting of three pages, is for foreman L. Mendoza in Kirk Yard.

Would those be all of the payroll records, were those your crews during the month of December, 1951?

The Witness: That is six of them? There were six, all told.

133 Mr. Hackbert: Yes, there are six, all told.

The Witness: That's right.

Mr. Hackbert: I will stipulate for the record, if the Court please, that these are the time slips for the crews under Mr. Gibson's supervision as timekeeper for the first half of December, 1951.

The Court: Do you want to introduce them?

Mr. Waitkus: Yes.

(Said instruments were marked Plaintiff's Exhibit 8, for identification, consisting of 21 pages.)

The Court: Plaintiff's Exhibit 8 is admitted.

(And thereupon PLAINTIFF'S EXHIBIT 8 was admitted in evidence.)

The Court: Do you—

Mr. Waitkus: May I let the jury see these?

The Court: Why can't you state, just generally?

134 Mr. Waitkus: Incidentally, may I say that this is the first time I have seen them. Perhaps I better have Mr. Gibson state what they show.

The Court: Why don't you just tell them what is on there? They will see it later.

Mr. Waitkus: For instance, the first sheet, I don't see the foreman's name—

Mr. Hackbert: The foreman's name is down at the bottom.

Mr. Waitkus: The first sheet, which is for foreman Hernandez, shows the name, account number, occupation—the first two are track foremen, one seems to be checked off, the others are laborers; and they show the rate, the number of hours time; they have a code number; and then they have what they call "I. C. C. Class."

Mr. Hackbert: Interstate Commerce Commission classification.

Mr. Waitkus: Interstate Commerce Commission classification.

Then the time of the individual. Some of them are listed as "S". What is the term "S"?

135 Mr. Hackbert: That means absent on sick leave, doesn't it, Mr. Gibson?

The Witness: Yes.

Mr. Waitkus: And then the columns either show 8 hours—most of these on the first sheet are 8 hours, and at the bottom they are tabulated; some have 48 hours; some 40 hours, some 32; and then they have a showing of total time in the next column; and then they have amounts figured in. That 14.53 rate, is that a day, a day rate?

Mr. Hackbert: Hourly rate.

Mr. Waitkus: They don't pay $14.53 an hour.

Mr. Hackbert. No. You have the decimal point wrong; that is 1.453.

Mr. Waitkus: There isn't any decimal point here on some of these; 1.453. Then they show the total wages in each man's case, and then in the outside column they show "Remarks." I don't see any remarks here. And the foreman signs that at the bottom. And in the top corner they show "Figured," "Checked," "Pun.," "Ver.," a number of initials, and "Roll No.," and so forth.

136 By the Court: Q. Is that what you made up?

The Witness: Yes, sir.

By the Court: Q. These are your figures, yours and this other man's?

The Witness: These are all mine.

By Mr. Waitkus:

Q. These you got out twice a month?

A. Yes, sir.

Q. In addition to these 21 pages which you got out twice a month, did you have to get any other records into the front office?

The Court: Hasn't he gone over that, the derailment?

Mr. Waitkus: There was what they called a distribution sheet.

By Mr. Waitkus:

Q. Did you turn in what they called a distribution sheet at any particular time of the month?

A. Yes, that went in once a month, at the end of the month.

Mr. Waitkus: Let me ask you, do you have a distribution sheet?

137 Mr. Hackbert: I don't have one. It wasn't feasible to locate one of those.

By Mr. Waitkus:

Q. What did the distribution sheet show?

A. That showed the type of work, each line for the type of work done by the foremen and their crews, and where the work was done, and how many hours was set aside for each job for each day that was turned in.

Q. Did these distribution sheets carry any record of the materials used on any particular jobs, such as ties, rails, ballast, and things of that sort?

A. That was taken off of the foreman's report, and checked on another sheet.

The Court: You went over that. He said that he made monthly distribution sheets for the use of ties, rails, amounts of spikes, and so forth.

Mr. Waitkus: I thought I hadn't covered it, your Honor.

By Mr. Waitkus:

Q. Now, Mr. Gibson, on this evening of December 12th or 13th, 1951—

138 The Court: Do you remember the date specifically?

The Witness: As to when we worked?

The Court: That night you worked, was it the 12th or 13th?

The only reason I asked this was so that we can tie it down and you don't have to say the 12th or 13th.

Mr. Waitkus: They have the records, if they would tell us exactly what night it was that he had the overtime—

Mr. Hackbert: I have Mr. Gibson's work sheet. I don't know whether this is something that was kept by him, or by someone else. And it shows there were 10½ hours worked on December 12th.

The Court: That would be the evening?

Mr. Hackbert: That appears to be the evening.

Mr. Waitkus: What was the 13th?

Mr. Hackbert: The 13th was 8 hours.

Mr. Waitkus: The evening he made out the payroll—

Mr. Hackbert: The evening that he worked over-

139 time was December 12th.

The Court: All right.

By Mr. Waitkus:

Q. Now, on December 12, 1951, you worked that evening getting out these payroll reports that were just introduced here; is that right?

A. Yes, sir.

Q. Who else worked with you that evening?

A. George Marjanian.

Q. And did you have to work by artificial light that night?

A. Yes.

Q. Can you describe the lighting facilities that you had in shanty 100?

A. Well, it was poor light at nights.

Q. What kind of light was it; did you have desk lamps?

A. No. It was a light in the ceiling.

Q. Can you tell us how many bulbs were in the ceiling?

A. It seems like there was only one bulb there, with a shade, flat round shade, you know, and a bulb screwed into it, but I can't tell you what wattage it was, because I don't know.

140 Q. The only time you had to use the light was when you worked in the evenings to get out these payroll reports: is that right?

A. Yes.

Q. Can you tell us on this particular evening of December 12, 1951, the condition of the floor?

The Court: This particular evening.

A. I don't know what the condition of the floor could have been that particular evening. The floor was dirty any evening, but that particular evening, I couldn't say; I just don't remember.

Mr. Hackbert: Well, I move to strike out that it was dirty any evening.

The Court: I will overrule the motion.

By Mr. Waitkus:

Q. Mr. Gibson, on these evenings that you had to get these payroll reports in, would you have any particular reason that you would have more traffic that evening than you ordinarily had?

A. We tried to keep from traffic in building 100 the day before the payroll was turned in, but that was impossible.

Q. What I am getting at is this, would you let the foremen and the other fellows know, that had to get

141 reports in, that you had a certain deadline to get these payroll reports out?

A. Yes, sir; the track supervisor was notified at the same time; we notified him when we were notified.

Q. And would that mean that all of those fellows would come in with different reports for you, so that you could get them ready, for that evening?

A. Well, when he gave his—

The Court: Wait. Read the question.

(Question read.)

The Court: Would these supervisors and foremen bring in reports, from which you would make up these reports, would they bring them in that day that you worked?

The Witness: The men I was keeping the time for would bring in their reports. But that's not the question, sir.

The Court: All right.

By Mr. Waitkus:

Q. Well, in other words, what I am driving at is this: About the time that these men quit work, at 4 or 4:30, would you have a number of fellows that would be coming in with these different reports for you?

142 A. They weren't exactly for me.

The Court: Would they come in at all?

The Witness: Yes, sir, they came in.

By Mr. Waitkus:

Q. So that on these nights you would have more traffic, to that extent?

Mr. Peters: I object to that, your Honor.

The Court: Well, I will sustain the objection.

By Mr. Waitkus:

Q. Did you use any adding machine to assist you in getting these reports ready?

A. Yes, I had to use an adding machine to get my work out.

Q. Did Mr. Marjanian have to use one?

A. Yes; yes, he did, because his work was heavy, too.

Q. Did you at any time ask your supervisor or superior for an adding machine to be furnished you or Mr. Marjanian at shanty 100?

A. I asked a couple of times for an adding machine, from Mr. Kinzel.

143 Q. And did they ever furnish you any adding machine?

A. No. They offered me an adding machine.
Q. Where?
A. At the accounting office.
Q. Will you explain that?
A. When I asked for the adding machine, he said, "Bring your work up here. We have adding machines at the accounting office. Bring your work up here."
I said, "Well, Mr. Kinzel, I can't bring my work up there and get it out because half of my work is coming in down here at building 100 all of the time, so I wouldn't have the material to work with up there."
And I couldn't use the adding machine down there because they would not allow us to take it out of the accounting office.
Q. Now, when would the accounting office close?
A. As a rule, at 4:30; they very seldom stayed after 4:30 in the accounting office.
Q. So that if you wanted to use the machines after 4:30, they were not available?
A. We were not allowed to stay there after the office was closed, or after the men in the office went home.
144 Q. Did Mr. Kinzel at any time see you using your own adding machine in shanty 100?
A. Yes. The assistant to Mr. Paige from Joliet was in Kirk Yard prior—I forget whether it was prior to the payroll day, turning in of the payroll, or the morning of the payroll day, and they were in building 100, and saw me using my machine. The assistant told Mr. Kinzel, "I didn't know they had adding machines up here". I told him that that was my adding machine, not the company's adding machine.
Q. Did you mention anything to them at that time about the amount of work, that you had to have an adding machine?
A. Yes, I told him that I was overloaded with work and I needed more help, and the only way I could get the work out was using my own equipment to get it out, and that other equipment had to be borrowed for George.
Q. And at that time did the company offer you any adding machines?
A. No, sir.
Q. Now, this evening of December 12th, how late did you work, Mr. Gibson?
145 A. Oh, about— I don't remember whether it was 8:30 or 9 o'clock, because we quit at 4:30, our time

stopped at 4:30, and then sometimes we might work for a half hour over, or an hour over, and then take a half hour for lunch, and then come back; and I can't say whether it was 8:30 or 9 o'clock; it was one of the two.

Q. When you finished your work that evening, can you tell us what you did with these adding machines, or if you did anything with them at all?

A. Well, when I finished my payroll, my payrolls, I put my adding machine over on the corner of Mr. Marjanian's desk, and then I gathered up my work and locked it up in my desk, and was putting on my coat to go out, to pick up the adding machine and put it in my car.

I forget what the question was that was asked.

(Question read.)

A. I would always put my adding machine in my car and take it back, because I only used it once a period.

The Court: On this particular night, what did you do?

By Mr. Waitkus:

146 Q. On this particular night, did you do anything with Mr. Marjanian's adding machine?

A. Yes, as I was going out to put my adding machine in my car, he asked me if I wouldn't put his adding machine under my desk.

Q. And did you do that?

A. Well, not immediately.

Q. Well, did you put the adding machine under your desk at any time?

A. Yes.

Q. Did anything happen to you at that time while you were putting this adding machine away?

A. Well, plenty happened. I can't remember if it was before I put the adding machine under or as I was getting out, but it felt like the roof fell in.

Q. Well, will you tell us just how you put this adding machine away, if you recall?

A. Well, I stooped down on my toe-tips, balancing the adding machine in my arms. As I was crawling under the desk, the middle of the desk, to put the adding machine way to the back, and there was a bar, kind of a foot-rest between the division of the legs of the desk, for a man's legs, to the back and close to the floor, and to keep
147 anyone from reaching in there with their hobnailed boots, to reach for that piece of board between the two legs of the desk, I would shove the sliding part of the

adding machine under the desk drawers on the right-hand side, leaving only the back end of the adding machine out, and close to that board and partially covered where the tape of the adding machine showed. In that way the machine was partially protected against harm or damage.

Q. What happened to you after you got the adding machine in there, if anything?

A. Well, it must have been as I was backing out, because I had a terrific bump on my head, and I must have slipped.

Mr. Hackbert: I move to strike out "I must have slipped," if the Court please. The question is what happened, not what he speculates or thinks must have happened.

The Court: Well, I will overrule.

A. (Continuing.) I lost my balance somehow and bumped my head on the edge of the drawer as I was getting out from under the desk. As I was getting out, I say I don't know whether I lost my balance, or not.
148 Anyway, I got a terrific blow on my head, and by that time I was out from under the desk but I went kind of blind and I lost my eyesight, and I groped back for my chair, because I knew it was there; the chair was always in the way, because the wall kept it from being pushed anywhere else. And my knees felt the back of the chair, and I sat down blindly in my chair, and I put my hands up on the desk and held my head, because it was hurting, just kind of a blue streak across my head, and, as I say, my sight disappeared; I sat there, and I don't know how long I sat there, maybe five seconds, maybe five minutes, maybe fifteen minutes.

Q. Did you talk to Mr. Marjanian, or did he say anything to you after that?

A. If he said anything at the time, I don't remember. Afterwards he asked me questions.

Q. After you felt better, Mr. Gibson, did you go home that night?

A. Not immediately.

Q. Well, you eventually got home?

A. Yes. I had Mr. Marjanian carry my adding machine out to the car, and warm the car up and bring it up to building 100 for me. It was a short distance away
149 from the building. I finished locking up the building, and then I went out to the car, and I drove him home and then I went home.

Q. Mr. Gibson, with the lighting you had in shanty 100, when you got under the desk were you able to see well?

A. No, sir.

Mr. Hackbert: I object to that, if the Court please. Obviously, you can't see well under any desk, no matter what the lighting is. The lighting in a room isn't intended to light the space under any desk.

Mr. Waitkus: There are certain degrees of light, your Honor, that might assist in seeing something that you can't see if it is a very dim light.

The Court: I will sustain the objection, as to the form of the question. As to how much light there was under the desk, if you want to go into that, I will permit it.

By Mr. Waitkus:

Q. Mr. Gibson, will you tell us about the color of the walls in this building, inside of the building that you fellows worked in, were they light or dark, would they 150 reflect light, or not?

A. We had good light in the daytime.

The Court: No. What was the type of wall, was it wall-paper or plaster?

The Witness: No, it was a board wall, but it was full of windows, sir.

By Mr. Waitkus:

Q. The floor, was that a bare floor, bare wooden floor?

A. Yes.

Q. And in the evening when you worked under the light in the room, was the floor level very bright so that you could see things on the floor?

A. No; no; no.

Q. Mr. Gibson, you indicated that your chair where you sat was close to the wall?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 4, Mr. Gibson, and ask you, is that the arrangement of your desk and the chair and cabinet, is that the way it was on the night you worked, on December 12th?

A. Yes, sir.

Q. So that the physical articles there have not been moved or changed any, to your knowledge?

151 A. No; no, it seems like that is the same, except I don't exactly remember that box there (indicating). I can't recall what that was for, if it was there.

Mr. Hackbert: What is that?

The Witness: That box. I forget what that box was for.

Mr. Hackbert: Referring to the box which appears at the right-hand margin of the photograph, attached to the upper part of the filing cabinet.

By Mr. Waitkus:

Q. Do you recall when this picture was taken, Mr. Gibson?

A. About around the middle of March.

Q. Of what year?

A. 1952—1953.

Q. That was after you returned from the hospital?

A. Yes, sir.

Q. I will ask you to look at this floor, and ask you whether the floor on the night of December 12, 1951, was in the same condition it is there, or whether it was dirtier.

Mr. Peters: I object to that, your Honor. He can describe the condition of the floor, but certainly he can't make a comparison.

152 The Court: I suppose that is right.

Mr. Waitkus: Let me ask it this way.

By Mr. Waitkus:

Q. Mr. Gibson, in this picture is there any change, as far as the floor is concerned, between what it shows in the picture now and what it was on the night of December 12, 1951?

A. The night I worked overtime the floor was much dirtier than that.

The Court: Do you want to send it around?

Mr. Waitkus: Yes. I want to ask one thing more, your Honor.

By Mr. Waitkus:

Q. This picture has a clock in it, does it not?

A. Yes.

Q. And what is the time shown in the clock?

A. About three minutes after two.

Q. And Plaintiff's Exhibit No. 2, is that another view of the same thing?

A. Yes, sir.

The Court: That is your desk?

The Witness: That is my desk.

By Mr. Waitkus:

Q. And Plaintiff's Exhibit No. 5, that is another 153 shot of you sitting at the desk there?

A. That is still my desk.

Q. Now, Mr. Gibson, before I pass these out to the jury, there is a frame panel directly in back of your head. Can you tell us what that panel was?

A. That is a telephone directory of the field and direct lines.

Mr. Hackbert: That is on which exhibit?

Mr. Waitkus: Plaintiff's Exhibit 4. It is also on 5, also on 3, on all three of them.

By Mr. Waitkus:

Q. And then there is another chart or bulletin of some kind next to that. Do you know what that is?

A. I believe that is the Railroad Retirement Act.

The Court: What has that got to do with this?

Mr. Waitkus: I just wanted to show, your Honor, the different items they had on the wall here.

Mr. Peters: Don't they appear in the photograph?

Mr. Waitkus: You can't see what it is; it is just a 154 frame. The jury might like to know what some of these items are.

The Court: Well, all right.

You are moving for their admission?

Mr. Waitkus: We are moving for the admission of Plaintiff's Exhibits 3, 4, and 5.

Mr. Hackbert: No objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBITS 3, 4, AND 5 were admitted in evidence and passed to the jury for inspection.)

Mr. Hackbert: Are you going to offer the other pictures, too?

Mr. Waitkus: Plaintiff's Exhibits 1, 2, and 6. No. 1, and No. 2 are the exterior of building No. 100, and Plaintiff's Exhibit 6 is showing part of this hump in the yards. We offer them in evidence.

Mr. Hackbert: No objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBITS 1, 2 AND 6 were admitted in evidence and passed to the jury for inspection.)

By Mr. Waitkus:

155 Q. Vern, after this evening of December 12, 1951, did you continue working on the same job, working in shanty number 100?

A. Yes, sir.

Q. Can you tell us whether you felt any effect personally from this blow you received on your head on December 12th?

A. Well, the next day my head was aching. I asked George for aspirin, if he had any aspirin; he did, and I took it.

Q. Did that continue for more than one day?

A. Several days, and then I wasn't bothered any more.

Q. You had no more headaches?

A. Later on, I might have had one or two; I don't remember that.

Q. Prior to the time that you received this blow on December 12th, were you able to get around well?

A. Oh, yes.

Q. Was there anything wrong with your walk?

A. No, never anything wrong with my walk.

Q. Did you at any time while you were working for the E. J. & E. sustain any other injury?

A. Yes, I did, one other injury.

156 Q. When was this?

A. That was while I was with the stationary rolling work car, when I first went to work.

Q. When you first went to work. And when was that, was that in February or March, that you talked about, of '51?

A. It must have been in maybe the first part of March, or maybe the middle of March.

Q. What kind of an injury did you sustain at that time?

A. A skinned shin.

Q. You skinned your shin?

A. Yes.

Q. Tell us how that happened, if you can.

A. Well, I was walking across the tracks to check my men, and as I stepped over a track the toe of my left foot must have caught under the tie, and as I lifted my right foot, to step over the track, my left foot didn't give because it was caught, and I fell across the track, striking my shin on the edge of the rail.

Q. That was to your left foot?
A. Left leg, left shin.
Q. Did you lose any time from that, any work?
157 A. No, sir.
Q. Did you have to go in to see the doctor at any time as the result of that accident?
A. Well, it was so minor I didn't even go down on sick call to the hospital. It was on a Friday, and right close to quitting time, on a Friday afternoon. Saturday I figured the hospital was closed; I figured it was closed on Sunday. I didn't know. And on Monday, when I called up Jake Strauss to report the amount of men that were available in the rolling cars up to that morning, I told him about the accident happening on Friday; and in the meantime we had passed the time allowed to report an injury. They should be reported immediately. And he told me then it made no difference whether it was late, or not; that I should go down to the hospital anyway, and turn in a report, which I did.
Q. And that was in March, you think, of 1951?
A. It was before I went to building 100; I just don't remember.
Q. Did that affect your walk in any way for any time?
A. Well, I favored the left leg, because the doctor scraped the scabs that had formed over the two days
158 off; it was tender, and they had it bandaged up.
Q. How long did you favor that leg at that time?
A. Until the scabs fell off.
Q. How long, what period of time, was it a week, or a day?
A. Well, it must have been a week, maybe, or better, that I limped a little bit.
Q. But when you went to shanty number 100, you had no limp, as far as your left leg was concerned?
A. No, sir.
Q. When you were hired by the "J," did you take a physical examination?
A. Yes, sir.
Q. And where was that physical examination taken?
A. At the hospital off of Broadway, next to the entrance.
Q. At about Second and Broadway, in Gary?
A. Yes.
Q. Is that where you went when the scabs were scraped from your left shin?

A. Yes, sir.
Q. Did you at any time after you had these headaches report to the hospital?
159 A. No, because—no, sir.
Q. And after these headaches that you had for several days, did you notice anything at any time afterward regarding your walk?
A. Ask that question again.
The Court: Did anything happen, did you notice anything about the way you walked?
The Witness: Yes, I did.

By Mr. Waitkus:

Q. When was that, if you recall?
A. That could have been in March, February or March, maybe, of '53. No, it would be—
The Court: Well, in relation to this December, when was it?
The Witness: The first time I had noticed anything, that I couldn't lay it to—

By Mr. Waitkus:

Q. When was it, was it in February or March of the following year, 1952, within two months or six weeks, something like that? That is what I am trying to find out.
A. It could have been in February or March, of 1952, when I checked my men; I was in such a rush to get my men checked, and back in to get my work finished, that
160 I had to walk at high speed, and by the time that I would get back to building 100 I noticed, as I stepped onto the three steps—two steps, or three steps, leading into building 100, that when I would go to lift my leg up, my right leg up onto the step, that there was kind of a, maybe like a tautness, that I noticed. That's all I could say at that time.
Q. That was what?
A. A tautness in my muscles.
Q. Did that condition eventually get any better or worse, as time went on?
A. Well, it got worse. I started limping later on.
Q. Did that continue right on until you left the employ of the E. J. & E.?
A. Yes; yes.
Q. Did you go to see any doctor about this limp that you had?

A. When I realized I was limping, I did.
Q. When did you go the first time, if you recall?
The Court: Approximately.
A. Approximately, in June.

By Mr. Waitkus:

Q. Who did you go see?
161 A. I went first to Dr. Stephens, a dentist, to check up on my teeth.
Q. Who else did you see?
A. Then I went to Dr. Radeff; I believe he was a chiropractor, and I had him take an X-ray to find out why I was limping, and why my arm had went lame.
Q. Your arm was also bothering you at that time?
A. Eventually, yes. Later on, my arm started to get lame, and I had to switch over to do my work, printing it with my left hand.
Q. Did you see any other doctors after you saw Dr. Radeff?
A. Yes. I left him because I was getting worse, and he wasn't doing me any good, so I want to Dr. Behn; and then after I was with him for about possibly six weeks he finally turned me over to Dr. Lewis, a neurologist specialist.
Q. Did Dr. Lewis examine you at the time?
A. I believe he did that same day.
Q. Well, you saw Dr. Lewis more than once, did you not?
A. Yes, sir.
Q. And after you saw Dr. Lewis, did he refer you to anyone, or any hospital?
162 A. Yes, he referred me to a Dr. Young just for an examination of my eyes, and then took me to the hospital for a spinal test.
Q. That was in Gary?
A. Yes, sir.
Q. And after this, where did you go, if anywhere?
A. I went back to work. I never lost any time.
Q. Well, you were referred to a Chicago hospital or a clinic by Dr. Lewis?
A. Yes, sir.
Q. When was that that you went in?
A. Well, my wife called me up on September 30th—
Q. September 30, of 1952?
A. Yes, sir; and notified me that I must be into the Billings Hospital that night before six o'clock.

Mr. Waitkus: Does the Court want to adjourn now? I might state that I have Dr. Lewis coming in at one thirty this afternoon, and I would like to put him on at that time.

The Court: We will adjourn until one thirty.

(And thereupon a recess was taken until one thirty o'clock in the afternoon.)

163 And at one thirty o'clock in the afternoon of said day, Tuesday, September 20, 1955, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: As I understand it, you want to withdraw the plaintiff from the witness stand and put on the Doctor?

Mr. Waitkus: That is right, your Honor. We would like to put the Doctor on, so that he can get back to his office, and then proceed with Mr. Gibson.

Mr. Hackbert: We have no objection.

The Court: Will you be sworn, please?

GEORGE LEWIS, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. Will you state your name to the Court and jury, please?

A. My name is George Lewis, L-e-w-i-s.

Q. Are you a practicing and licensed physician?

164 A. In the State of Indiana, yes.

Q. Where do you live, Doctor?

A. In Gary.

Q. How long have you lived there?

A. Approximately four and one-half years.

Q. Have you practiced in Gary during that time?

A. Yes.

Q. Where is your office located, Doctor?

A. 504 Broadway, in Gary, which is the Bank Building.

Q. How many years have you been licensed to practice medicine?

A. In the state of Indiana?

Q. Yes.
A. Since 1945.
Q. Do you have a license to practice anywhere else?
A. In Illinois.
Q. Where did you receive your education, Doctor?
A. Medical School was Loyola, Loyola University, in Chicago; postgraduate work was done, four years, at the Cook County Hospital, Chicago.
Q. What hospitals are you connected with at present, Doctor?
A. Gary Methodist Hospital, and Gary Mercy Hospital.
Q. Are you connected with any other institution at this time, Doctor?
A. At the Chicago Medical School and the Loyola
165 University.
Q. In what capacity are you connected with those schools?
A. As clinical instructor.
Q. You are an instructor at those schools?
A. Yes.
Q. What subjects are you an instructor in?
A. I am an instructor in neurology and medicine.
Q. Did you specialize in any particular fields, Doctor?
A. I took postgraduate work in neurology and internal medicine.
Q. Are you a member of any medical societies or associations?
A. I am a member of the Lake County Medical Society, the Indiana State, and the American Medical Association.
Q. Are you certified by any medical boards?
A. I am certified by the American Board of Internal Medicine.
Q. Have you ever written any books or articles on any subjects?
A. No books, but two articles of a neurological nature.
166 Q. That is, for the medical profession?
A. Yes.
Q. Doctor, have you attended the plaintiff, Vern Gibson, or Clairon Vern Gibson, at any time?
A. Yes.
Q. When was that?
A. I first saw Mr. Gibson on September 6, 1952.
Q. And prior to that time, did you know Mr. Gibson?
A. No.

Q. Where did you first see Mr. Gibson?
A. In my office.
Q. Was he referred to you by someone?
A. Yes; he was referred by his physician.
Q. Doctor, did you take his history at that time?
A. Yes.
Q. Can you tell us what that history showed?
A. Mr. Gibson stated on his first visit that for about a year he had noticed a kinking in his right leg, especially on exertion, such as fast walking, and then there was a gradual appearance of dragging of his right foot, and he also noticed that there was weakness of his right hand, and he couldn't exert pressure very well in his hand. He
167 didn't complain of any pain, or any particular queer sensations, and he didn't seem to complain of any difficulty in using his facial muscles, such as swallowing and moving his eyes.

He stated he had never been sick before, outside of the usual childhood diseases and typhoid fever.

He also stated at that time that he was having some trouble urinating, that is, he could not hold his urine like he should. This was all gradual in a period of approximately a year.

He also stated that he could not write well, and I obtained a specimen of his handwriting, of his first name, which indicated that there was a change in his handwriting.

Q. Now, did you observe his walk or gait as he came in, objectively, let me say?

A. Well, the physical examination which that would fall under, the neurological examination, was definitely abnormal. Mr. Gibson limped. I should state that the limping was an actual dragging of his right foot. There was a definite weakness of the right side of his body, which would be the arm and leg, and the reflexes were increased on that side.

168 The examination of his eyes with a special instrument indicated a definite abnormality in his eyes, which to me indicated that we were dealing with something serious.

Q. Were reflex tests given to him, Doctor?
A. Yes.
Q. What is the reflex test called, Doctor?
A. Well, they are called deep tendon reflexes, and Babinski's Sign; they go by various names. But they

showed a definite abnormality on the right side of the body.

Q. Are these reflexes present in normal people?

A. Some of the reflexes are normal. They become abnormal when they are exaggerated or they disappear.

Q. That was true in this case?

A. In Mr. Gibson, they were abnormal.

Q. Can you tell us what you prescribed, or what sort of treatment you gave him, Doctor?

A. I did not give Mr. Gibson any treatment. I advised him to go into the hospital and have a spinal puncture done.

I referred Mr. Gibson to an eye physician, who examined him. And I had head X-rays taken.

The Court: Had what?

169 The Witness: Had head X-rays taken.

By Mr. Waitkus:

Q. You say you had a spinal puncture taken?

A. Yes.

Q. Was that taken at a hospital?

A. Yes. Mr. Gibson was admitted to the hospital and the spinal puncture was done on the 14th of September, which definitely was abnormal, indicating a definite change in his nervous system.

Q. Doctor, who took these X-rays?

A. Dr. Sagel.

Q. Did you bring the X-days in?

A. No; Dr. Sagel disposes of his X-rays after a certain number of years, and all I have is the report.

Q. You used the X-rays at the time to diagnose his condition, did you?

A. To assist me in the diagnosis, yes.

Q. As far as the X-rays were concerned, did they assist you in coming to any conclusion as to what his condition was?

A. Well, the answer would be yes and no.

Q. Would you explain that, please?

A. Well, one part of his report indicated that there 170 could be an abnormality.

Mr. Hackbert: Do I understand that you are testifying to the contents of Dr. Sagel's report to you?

The Witness: Yes.

Mr. Hackbert: Rather than your own interpretation of the X-rays?

The Witness: Well, I have the report, and Mr. Waitkus asked me what conclusions I drew. I would have to draw them from his report.

Mr. Hackbert: You did not interpret the X-rays yourself?

The Witness: No, I did not.

Mr. Hackbert: Your Honor, I think I have to object to it, on the ground that the report is hearsay.

The Court: Well, I think that is true, as far as the X-rays are concerned.

By Mr. Waitkus:

Q. You were not able to bring any X-rays with you?

A. That's right.

Q. Now, in addition to the X-rays, you say you took a spinal puncture and you gave these reflex tests. Did

171 you come to any diagnosis after that?

A. Yes.

Q. What was your diagnosis?

A. I felt that Mr. Gibson probably had a brain tumor.

Q. Did you refer him to any hospital?

A. Yes, I consulted with his physician who sent him to me and told him that I was asking Mr. Gibson to go into Billings Hospital for a brain surgery examination.

Q. Now, the diagnosis you made of a brain tumor, Doctor, was that a definite diagnosis or was that your impression?

A. That was my impression.

Q. And he was sent in, he went in to Billings Hospital?

A. He went in to Billings Hospital.

Q. Are there any other conditions that are similar to brain tumor, that would have the same symptoms?

A. Yes, there are other conditions that would produce the same symptoms.

Q. Would a subdural hydroma produce the same symptoms?

A. Yes.

172 Q. Can you tell us how a subdural hydroma may be brought about, Doctor?

A. May I use the blackboard? I can do much better with the blackboard.

Q. Would you step down to the blackboard and tell us?

A. The question was asked by the attorney, how is a subdural hydroma formed.

The Court: Will you tell us what those two words mean? Are they susceptible of being put into ordinary language?

The Witness: Yes.

The Court: What?

The Witness: Well, you might say it is a water sac on the brain.

The Court: All right.

The Witness: With your permission, your Honor, I would like to elaborate a little upon it so that I can get into the subject.

The Court: All right.

A. (Continuing.) The terminology is chronic subdural hydroma.

Now, first I will attempt to explain to you the normal structure of the inside of the head, as best I can, using
173 language that we all can understand.

Now, this is the skull, the bony part (drawing diagram). The scalp and hair don't play any part in this at all. Immediately underneath there is a thick layer of tissue which is usually at points firmly attached to the bone. This is called the dura. Under it is a somewhat silky layer of tissue which is called the arachnoid, because it is as fine as a spider's web, and "arachnoid" means spidery. And underneath is the brain. This is very diagrammatic. And the brain is enveloped by an even, fine membrane called the pia.

Now, between the pia and the arachnoid is fluid. This fluid is a lubricating fluid, much like in your automobile, and it looks like water; you can't tell the difference. Now, this fluid acts as a cushion, just like grease does, or some sort of protective pad for the brain, because the brain is in a very thick bony structure that we call the skull. It is a box; it won't expand.

Now, should there be a blow of any sort to the head, whether it be by a thrown ball, or struck on the head
174 with a blunt object such as a baseball bat, or working in your kitchen, under your kitchen-counter sink, fixing your pipes, and, bang, you hit your head, you may get—this doesn't happen always, fortunately—you may get a tear of the arachnoid and fluid from the subarachnoid space—sub means under—from the subarachnoid space goes out into the dural space, what we call the subdural space. This then shuts off, the tear closes. If you are under any severe tension, you have to crawl out of

something, or you strain yourself to keep from falling, you may push in a lot of fluid, so there now occurs a little sac—not a sac, you might say a certain amount of fluid in an area which does not contain fluid. This tear may heal, may close over. Now, within twenty-four hours there is a new layer laid down around this bubble of fluid, much like you see a fluid level in a carpenter's square, or something like that, and there is, well, you might say, a very fine web laid down around this bubble, so that if I may take this pia out and magnify it, and this (indicating) is the dura, we now find the bubble here, and around it, on the dotted line, is laid down this very fine membrane.

175 And by studies which were done by experts, using the microscope, they followed these membranes experimentally for many months, even into years, and they found that this membrane will gradually harden and become as hard and as tough as the dura itself, which has the texture you might say of kid leather, and this remains as a mass in the brain.

Now, this little sac may grow in size by attracting fluid to it again through the arachnoid or from the cells which make up this lining here, so this thing may expand.

Now, that is the subdural hydroma.

Q. Doctor, as that hydroma stands, does it do anything, does it affect the body in any way? Are there any symptoms?

A. It will affect the brain.

Q. It will affect the brain. And by affecting the brain, you mean it presses on the brain?

A. That's right.

Q. And what would that do— suppose it affected the motor center?

A. If it compressed the motor center, it would cause paralysis.

Q. In this instance of Mr. Gibson, would you say
176 that was what was happening to him?

Mr. Hackbert: I object to that, if the Court please. There is no basis laid for an opinion of that kind on the Doctor's part, to say that was what happened to Mr. Gibson.

The Court: Did you then, or later, make this diagnosis, or not?

The Witness: Your Honor, I sent this patient in to Billings Hospital, to a neuro-surgeon, who operated—

Mr. Hackbert: If I may interrupt, that is hearsay.

The Court: This is what somebody else told you, or you read?

The Witness: I was sent the report.

The Court: I think I will have to sustain the objection.

By Mr. Waitkus: Q. Doctor, you said that the same symptoms would show up from a brain tumor that would show up from a subdural hydroma; is that true?

A. Yes. The mechanics of any foreign mass,
177 whether it be a bullet which lodged in the brain, or a blood clot, we have all heard of blood clot which formed on the brain, or fluid from a chronic subdural hydroma, the symptoms would be the same.

Q. In other words, the human body would be affected the same way?

A. The same way.

The Court: Are you through with the demonstration?

Mr. Waitkus: Yes, I believe so. You may sit down.

By Mr. Watikus:

Q. Doctor, if this hydroma or tumor or whatever mass there is in the brain should be on the left side of the brain or the skull, which side of the body would it affect?

A. If the hydroma were on the left side of the brain, it would affect the right side of the body.

Q. In other words, why would that be?

A. Well, the nerves which control the right side of the body arise from the left side of the brain.

Q. And vice versa?

A. Yes.

Q. Can you tell us, Doctor, what some of the causes of hydroma are?

178 A. Well, the cause in almost ninety-nine per cent of the cases is trauma.

Q. By trauma, what do you mean?

A. Injury.

Q. Does the injury have to be severe, or can it be slight?

A. The injury can be slight, in fact, the patient may not even be aware or even remember the injury.

Q. But you say that the hydroma forms usually when a person is in a strained position, did I understand you to say that?

A. That is part of it. A hydroma may occur as the

result of an injury to the head, which will tear the layer I have indicated as the arachnoid, allowing fluid to escape into the space under the dura, but if the patient is under extreme muscular tension, straining or coughing, bent over, or trying to support himself, he will force more fluid into the subdural space.

Q. Now, as this hydroma forms or grows, would the manifestation of symptoms also become more pronounced?

A. Yes.

Q. And eventually then, Doctor, if the hydroma 179 formed got large enough, would it kill an individual?

A. Yes.

Q. So that the practice would be to remove the hydroma?

A. Yes.

Q. That would be to relieve the pressure?

A. Yes. The effect of the pressure is to destroy brain cells.

Q. And once brain cells are destroyed can they be rejuvenated?

A. No.

Q. And the larger the hydroma, the more brain cells are destroyed?

A. That's right.

Q. When brain cells are destroyed, does that mean there is brain damage?

A. Yes.

Q. Now, Doctor, after there is a tear in this arachnoid membrane and the hydroma starts, how long after that would there be symptoms which would show up on the individual?

A. Well, that will vary; it may take a few days, a week, a few weeks, months. In my opinion, I would say it would depend upon the size of the hydroma, and 180 how fast it could grow, if it were growing.

Q. If it started and continued to grow, would it get progressively worse?

A. Yes.

Q. In other words, this type of an injury or condition of the brain can be brought about by a blow on the head, as you said?

A. Yes.

Q. Now, how many times did Mr. Gibson see you at your office, Doctor?

A. He saw me on the 6th of September, 1952, which was

the first time, and I next saw him in the office on the 13th, and then I saw him in the hospital on the 14th of September, the same year, and then he was referred in to Chicago.

Q. After you referred him to Billings, they sent back a report to you?

A. Yes.

Q. Now, Doctor, assume that a man 48 years of age, who had been in good health prior to December 12, 1951, was putting a piece of equipment, an adding machine, under a desk, while under crowded, cramped quarters, and
181 while this equipment is being placed under the desk he loses his balance, or his foot slips, as the result of something that was on the floor, and in trying to catch himself he hits his head on the bottom or the edge of the desk; he is dazed for several minutes, to the extent that the man feels that he can't see for a little while; that he has a severe pain in his head, and for the next several days has headaches, and thereafter he has no further symptoms or pains except that in February, 1952, several months later, he has a slight weakness in his right leg and foot, which progressively gets worse, from a weakness to a drag and then to a limp, and then he has a weakness which also appears in his right arm and hand; and then he sees several doctors who diagnose it as a possible brain tumor; and that thereafter he goes into Billings Hospital in Chicago, to be more exact, on September 30, 1952, and an operation is performed on October 6, 1952, under the diagnosis that the man had a chronic left subdural hydroma; that an operation was performed, that the hydroma and the membrane were removed and the liquid drained; that thereafter, on October 26th, the man was again operated on for an abscess on the brain or
182 infection which started from the operation on October 6, 1952; that thereafter the man was released from the hospital; that at the time his improvement was only temporary, that he still continued with the limp and drag to his right leg and the weakness in his right arm; now, will you tell us, Doctor, whether in your opinion, with reasonable certainty, the blow or bump to his head was a competent producing cause of the conditions that I have described to you?

Mr. Hackbert: I object to the question, if the Court please. It does not inquire if the Doctor has an opinion, in the first instance.

Mr. Waitkus: I asked whether, in his opinion.

The Court: I suppose, first, preliminarily, whether he has any opinion, and, if he has, what his opinion is.

By Mr. Waitkus:

Q. Doctor, do you have an opinion on that?

A. According to what you state—

The Court: Do you have an opinion? Right now it is not a question of what it is. Do you have an opinion,
183 with reasonable medical certainty, as to whether or not this occurrence would be a competent producing cause of these later symptoms?

The Witness: Yes, I would have an opinion.

By Mr. Waitkus:

Q. What is that opinion?

Mr. Hackbert: I realize that the Doctor has been called out of order and there is some of the medical history at Billings that is not in yet. I assume that you propose to connect it up?

Mr. Waitkus: We will connect it up. We tell you that we will connect it up with additional evidence. We understand that he cannot be here tomorrow, so we had to put him on today.

Mr. Hackbert: I just wanted to make sure that a connection was going to be forthcoming.

The Court: Subject to proof as to the missing links in the hypothetical question, the Doctor may answer.

184 The Witness: Will you read the question again, please?

(Question read.)

Mr. Waitkus: As to whether or not, in your opinion, with reasonable certainty, the blow or bump to his head was a competent producing cause.

Mr. Hackbert: I object to the question, if the Doctor is being asked if it was.

The Court: What is his opinion, rather than is it his opinion.

By Mr. Waitkus:

Q. What is that opinion, Doctor?

A. My opinion would be, from the facts that you have stated in this hypothetical case, this assumption, that this patient suffered a chronic subdural hydroma as the result of an injury, the injury being the blow that he received on

his head when he was doing whatever he was doing under that particular piece of furniture.

Q. And your opinion is, Doctor, that this blow to his head was the competent producing cause?

Mr. Hackbert: I object to that; it is leading. The Doctor has to express his opinion in his own words,
185 not have counsel put them in his mouth.

The Court: I think that he has expressed his opinion.

By Mr. Waitkus:

Q. In your opinion, Doctor, based upon reasonable certainty, what would be the prognosis with respect to the future course of his condition?

A. The prognosis, in my opinion, the prognosis in such an instance, it would probably lead to permanent injury.

Q. By permanent injury, you mean—

A. I mean that the man would be left with some paralysis and the inability to use those limbs which were affected as the result of the brain pressure.

Q. Now, Doctor, if the patient in April, of 1952, had an abscess on the left side of the brain, which was drained, can you tell us whether that would affect his condition for better or worse in any way?

Mr. Hackbert: I object to that, if the Court please. I realize again that they have got the handicap of connecting it up, but I know of no evidence that has been
186 introduced either by Mr. Gibson on deposition or by the deposition of Dr. Hanna of any draining of a brain abscess in April, of 1952.

Mr. Waitkus: Not April, of '52; April, of '55; I mean 1955; it was this year.

The Court: Better restate it, then.

By Mr. Waitkus:

Q. Now, Doctor, if this patient has an abscess on the brain which is relieved or operated on and drained in April, of 1955, would that affect his condition any?

A. It would make it worse.

Q. Can you tell us how or why an abscess would form in this type of a situation?

A. Well, there is already one weak point in the defense of the brain, that is, the body's defense of the brain, and it serves as a point of low resistance, and if there is any infection anywhere in his body it may lodge at that point and cause an abscess.

Q. The fact that on October 22, 1952, after this first operation, he had an abscess on the brain there, could that in any way be connected to this abscess that he had in April, of 1955?

187 A. I am at a loss—

Mr. Hackbert: I object, if the Court please. Whether it could be connected in any way, I think that goes into the realm of speculation and conjecture. You have to have a connection with a reasonable degree of medical certainty.

The Court: I don't know if the Doctor can answer that, but I am going to overrule the objection.

(Question read.)

The Court: From a medical standpoint.

The Witness: Yes, but I would like to ask something before I answer it, if I may.

Mr. Waitkus: Go ahead.

The Witness: In your assumption that you read to me, or that you stated, did you say abscess in October, 1952, or subdural hydroma?

Mr. Waitkus: The subdural hydroma was October 6, 1952.

The Witness: And then in your assumption you are stating—

The Court: You are stating a new fact, about an 188 abscess?

Mr. Waitkus: I stated originally that first he had the hydroma, and then the abscess was on October 22; that was about 14 or 16 days later, while he was still in Billings, that infection set in.

The Court: You are asking the Doctor whether, from a medical standpoint, there would be a connection between that abscess and one three years later?

Mr. Waitkus: Yes.

A. Yes; in my opinion, there would be.

By Mr. Waitkus:

Q. What are the reasons for that opinion, Doctor?

A. Well, if the man had an abscess in the site of the previous surgery done for an abnormality resulting from injury, had one abscess, the feeling that I would have is that that abscess somehow—maybe a few germs got away and just laid dormant in that area until a future date when his resistance was low enough that the germs grew and formed another abscess.

Q. Doctor, you saw Mr. Gibson here this afternoon, did you not?

189 A. Yes.

Q. You observed his condition, his gait and arm?

A. Yes.

Q. From the time you first saw him, would you say that he has improved any or whether his condition has remained the same?

A. He has not improved.

Q. He has not improved. Would you say, Doctor, from the fact that he has not improved, that his condition today would be a permanent disability?

A. Yes.

Q. Doctor, you testified that you are a neurologist. What field does neurology cover?

A. Neurology principally covers diseases of the nervous system due to—well, not due to the field that a psychiatrist would take care of; actually, what we call medical neurology. No surgery is done by the physician.

Q. Doctor, I think you mentioned that Mr. Gibson complained of having to go to the bath room or rest room occasionally or rapidly, I should say: the fact that that condition still exists, is that in your opinion part of the symptoms of this injury he received?

190 A. Yes.

Q. Will you tell us the difference between a chronic hydroma and an acute hydroma?

A. The acute would be the symptoms arising immediately, and the chronic would be over a period of time.

Mr. Waitkus: I see.

You may cross-examine.

The Court: We will take a short recess.

(A short recess was taken.)

Cross-Examination by Mr. Hackbert.

Q. Doctor, as I understand it, you specialize in neurology?

A. Not completely, Mr. Hackbert.

Q. Well, what else?

A. Internal medicine.

Q. And it was in connection with your internal medicine practice, the last time you testified against me it was in a heart case?

A. That's right.

Q. As a neurologist, you do not perform brain surgery?

191 A. No, sir.

Q. Your field of activity, so far as your patients are concerned, in brain difficulties is limited to diagnosis and treatment by other than surgical measures?

A. Yes, sir.

Q. And in the course of your professional training, did you ever have occasion to perform an operation for the removal or relief of a subdural hydroma?

A. No.

Q. I take it, therefore, that you are not familiar with the appearance of such a growth, as you find it in the course of surgery, from your own knowledge?

A. No.

Q. Is your knowledge of the subject matter as to how these growths develop a matter of your medical training and experience then rather than of any actual observation of the thing itself?

What you have told us about how this condition develops within the brain or the coverings of the brain is a matter of what you have been taught in the course of your medical schooling and training rather than what

192 you have learned by observation in the actual surgical operation itself?

A. As far as surgery is concerned, yes. However, if I may add, Mr. Hackbert, at the autopsy table we see the effects of these things which are done in surgery.

Q. You have done that, have you?

A. Yes.

Q. You said, Doctor, as I remember it, that the majority of subdural hydromas are caused initially, that is, the tear in the brain covering is ordinarily caused by trauma?

A. Yes.

Q. Now, that may be any kind of application of force to the head?

A. Yes.

Q. It does not make any difference where on the head the blow or impact occurs, the result may follow?

A. It may follow.

Q. It doesn't make any difference how severe the blow is?

A. That's right.

Q. It may be, I think you said, that the patient
193 may not even be aware of or remember the incident that caused it?

A. He would be aware of having had a blow to the head of some form or another, but he may not remember the incident; the blow might have been so mild that it just escaped his memory.

Q. And, of course, as between several mild blows, there would be no way of telling which one it was that caused it?

A. Well, there might. If you sat down and asked the person who had been subjected to this, and he said, "I have been struck on the head several times, but one, I was a little bit dazed afterwards; I just didn't feel right"; you might hang your hat on that one.

Q. Is there a progressive chain of these symptoms from the time of the blow that causes the tear?

A. Yes; it is a gradual progressive appearance of the symptoms.

Q. Normally, do the headaches continue?

A. The headaches may be present, or may be absent.

Q. What is the significance of the disappearance of the headaches and their total absence for a period, we
194 will say, weeks or months?

A. Nothing.

Q. Does the initial onset of the headaches have any significance, that is, the time of their onset?

A. It would have significance as to—it may be the first sign of the difficulty.

Q. And for a period of time the headaches may come and go before the loss of function in some part of the body first begins to manifest itself?

A. If the headache is the first symptom.

Q. In the situation that was explained to you in the hypothetical question, the appearance of the headaches was the first symptom there in the hypothetical question, was it not?

A. Mr. Hackbert, I can't remember, honestly.

Q. Well, did you have that in mind at the time that the question was asked?

A. Well, I didn't pinpoint it as to headache.

Q. What was the first symptom in the hypothetical question that appeared to you to be significant?

A. Well, I would say that the first symptom that was stated, the fact that the man had had the blow on his head, and then he was dazed for a little bit; and I am

honestly saying I don't remember the exact sequence
195 of where the headache appeared, but my interest was on the progression of the findings that the patient complained of.

Q. That is, the progression of the symptoms, the loss of function of the leg and arm?

A. To me, Mr. Hackbert, that is a little bit more important because people who have had blows on the head may have a headache now and then, and it is not necessarily related to subdural hydroma.

Q. All of us have headaches?

A. That is right.

Q. All of us get blows on the head some place or other?

A. That is right.

Q. If I would take off my glasses, I could show you a good black eye that I got working in my yard last week, but I don't think I have a subdural hydroma.

A. No; nor do I think that you have a fractured skull.

Q. Now, is the appearance of the initial loss of function of the arm or leg significant with reference to the development of a subdural hydroma?

A. Yes.

196 Q. That indicates that the hydroma is there and causing some pressure on the brain?

A. Yes.

Q. Now, when Mr. Gibson first came to you in September, of 1952, as I understand it, he gave you of history of having a kinking in his right leg, especially in the foot, on walking, for about a year prior to that time?

A. I must have given you the wrong impression, Mr. Hackbert. The man stated his symptoms began about a year ago, and that there was a gradual progression over the period of time that I had seen him.

Q. Now, the physical thing that permits the formation of a subdural hydroma is this tear in the lining of the brain?

A. That is right.

Q. Now, that tear may result possibly from causes other than a blow, may it not?

A. I would answer that this way, if you are using "blow" as a general term for trauma or injury—

Q. I am using "blow" in the sense of external violence.

A. Well, external violence, you will have to qualify
197 that for me, too.

Q. Well, external violence in the form of an impact upon the skull.

A. That is unusual, to have it like that.

Q. To have a subdural hydroma caused that way?

A. Yes.

Q. What is the kind of trauma, then, that normally causes a subdural hydroma?

A. External violence.

Q. And external violence makes the impact felt where?

A. Directly beneath the skull.

Q. I guess maybe you misinterpreted my earlier question. Now, may there occur a tear in the arachnoid covering of the brain as the result of a weakness in the arachnoid tissue, may that occur spontaneously and without blow on the skull?

A. To form a subdural hydroma?

Q. Yes.

A. No.

Q. Assume that there is a brain defect—

A. Yes.

Q. —one that, we will say, is the result of a failure of development; may that also manifest itself in a weakness of the tissues of the arachnoid lining which would
198 predispose that individual to a tear or a hemorrhage in that substance?

A. No.

Q. Is the arachnoid tissue subject to giving way, the way other structures of the body are, say the walls of the blood vessels?

A. Yes.

Q. And that would result, would it, when there has been more pressure behind the arachnoid lining than the strength of the lining is able to resist?

A. Yes.

Q. What may cause that kind of condition in the arachnoid lining, arachnoid covering of the brain?

A. Well, the most common cause that comes to my mind is what we call the spontaneous subarachnoid hemorrhage, where some particular blood vessel gives way and may burst, and if the pressure under the arachnoid is great enough from the blood it will burst through and cause a subdural hemorrhage.

Q. And that resulting sac or fluid within the sac would ultimately break down into a colorless liquid which would

be indistinguishable upon observation, upon operation, from the subdural hydroma; is that right?

190 A. It may.

Q. What causes a subarachnoid hemorrhage of that kind?

A. A subarachnoid hemorrhage is usually due to the formation of a small dilated portion of the blood vessel, in other words, a false pocket.

Q. Is that a false pocket in the arachnoid, or in the brain substance?

A. In the blood vessel.

Q. And that may be a blood vessel which either serves the brain or the arachnoid?

A. Or the arachnoid. Generally it is, almost one hundred per cent of the time, of the brain substance.

Q. And if there is a failure of development of the brain, that may be a situation in which there is a greater likelihood of a spontaneous subarachnoid hemorrhage?

A. No.

Q. Why not?

A. Because most of the time, in cases of subarachnoid hemorrhage that I have seen in my experience, they have all been of normal individuals who in most instances have had no antecedent or previous history of brain dif-

200 ficulty of any nature. And those who go on and die, and an autopsy is performed, we find no abnormality in the brain other than this small dilated portion of the blood vessel containing the clot.

Q. Did you perform the spinal puncture?

A. Yes.

Q. I take it, so far as the development of a subdural hydroma is concerned, there is no normal rate of speed of development or speed of growth?

A. There is none that we can plot and say "This is typical".

Q. You can't tell from its appearance, upon autopsy, how long the hydroma had existed in the man's brain?

A. Yes, generally you can.

Q. Can you tell when it started, or just how long it has been in approximately the same condition as you find it?

A. You generally can, give or take say two or three weeks to a month.

Q. In your experience, then, upon observation of a subdural hydroma, a doctor who is expert in the field

should be able to tell, within a few weeks time, how
201 long that condition has existed in the man's brain area?

A. Yes.

Q. Do you have an opinion, Doctor, of your own as to how long it takes a subdural hydroma of a certain size to develop from the onset of the initial tear?

A. Well, let's see if I understand your question. I have an opinion, yes, but it would depend. To me, as a doctor, the appearance of a subdural hydroma occurs at the time of the tear and the transfer of fluid into the space under the dura.

Q. Assuming that as the beginning of the period of time, are you able to say, in your experience, from the size of the sac containing the subdural hydroma, the size, the thickness of the walls of the sac, how long it had taken that condition to develop?

A. Approximately.

Q. And when you say approximately, within what period of time?

A. Well, within say a month to five weeks, six weeks.

Q. How long would it take a subdural hydroma of,
202 say, two centimeters in length to develop, in your opinion?

A. Well, when I say that I can tell, I can tell from the appearance of the membrane that would be surrounding the hydroma; it is the membrane that gives you the clue.

The Court: As to how long that has existed?

The Witness: Yes.

By Mr. Hackbert:

Q. Well, now, assuming a membrane was described as a clearly defined bluish-grey membrane which was obviously old and thick, is that sufficient information to enable you to give an opinion as to the length of time that the sac had existed?

A. Ten months to a year.

Q. I take it that the rate of progression of the appearance of symptoms is a matter that varies as between individuals?

A. Yes.

Q. With some individuals the symptoms will progress from their initial appearance to a serious and disabling state within a relatively short period of time, and in
203 others it may be a matter of months or even longer?

A. That is right.

Q. Is there a difference in the effect of a subdural hydroma, which I assume is a somewhat movable and shifting structure, and the effect of a brain tumor or a foreign object, you mentioned such a thing as a bullet, which is firm and inelastic, so far as the severity and the course of the symptoms?

A. No. In the first place, the hydroma does not shift about very much. Once the natural processes of the body find this certain amount of fluid in a place where it is not supposed to be, they immediately set up the process of encapsulating or encircling this amount of fluid and form a membrane so that within thirty-six hours that bubble or fluid is not going anywhere; it is going to remain right there.

Q. But the hydroma is not as rigid a structure, is it, as a brain tumor or a solid foreign mas .

A. No.

Q. Did you observe anything about the formation of this man's skull at the time of your examination of him?

204 A. Not—

The Court. You mean from a normal or abnormal standpoint?

Mr. Hackbert: Yes.

A. Not that I can remember, Mr. Hackbert.

By Mr. Hackbert:

Q. You have no note of it in your report?

A. No. Elsewhere, it was made mention, but not in my information.

Q. At the time that the man was your patient, he gave you no history of any particular incident in the way of a blow on the head that occurred to him, or that he recalled?

A. I have no information in my record.

Q. And you have no independent recollection of any such history being given you?

A. My memory would be highly colored by now, Mr. Hackbert.

Q. The more reliable index at this point is what your record is?

A. Yes.

Q. After that event, you saw this man as a patient only three times?

A. That's right. I was rather concerned and 205 wanted him to get taken care of immediately.

Q. And you sent him to a neurosurgeon for the operative treatment that you thought was necessary?

A. That's right.

Q. And from that time you have not seen him until rather casually here today?

A. That's right.

Q. You had never seen the man prior to the time he came to you as a patient?

A. That's right, I had never seen him.

Q. Doctor, in the course of your own practice, how many cases of subdural hydroma have you had occasion to diagnose and in any way treat?

A. Mr. Gibson had the privilege of being my first one.

Q. Is he your only one?

A. So far.

Mr. Hackbert: I think that is all.

Redirect Examination by Mr. Waitkus.

Q. Just a couple of questions.

You stated that your performed autopsies, Doctor?

A. Yes.

206 Q. In what connection, may I ask?

A. Well, both as a practicing physician, and others as a deputy corner.

Q. You are a deputy coroner at this time?

A. Yes.

Q. Doctor, speaking of the skull, let me put it this way, is every human skull symmetrical, and by that I mean identical on each side?

A. No.

Q. Is there a variance?

A. Yes.

Q. As a matter of fact, would you say the variance was normal?

A. Well, there is a normal variance up to a point of abnormality, if I may be permitted to make that statement.

Q. As far as Mr. Gibson was concerned, did you notice on your examination outwardly whether there was abnormality?

A. I have no record of it.

Q. In other words, that is what determines hat size: is that right?

A. It helps.

Q. Doctor, this type of damage to the brain that
207 Mr. Gibson had, would that tend to affect his memory in any way?

Mr. Hackbert: Just a minute, if the Court please. I don't know what the question encompasses when it speaks about "this type of damage to the brain". After all, all this Doctor knows, of his own knowledge, is a tentative diagnosis that he made of this man.

Mr. Waitkus: I will withdraw the question, to save time.

By Mr. Waitkus:

Q. Doctor, where you have subdural hydromas, or brain tumors, pressures on the brain, would that have any tendency to affect the memory of the patient or the individual?

A. Yes.

Q. Doctor, is it or isnt it a fact that a subdural hydroma is a rare thing?

A. Well, I would rather say it doesn't happen very often. I have talked to some of the neurosurgeons, and they say they haven't seen very many.

Q. But when a subdural hydroma forms, is that the way it is formed, as you explained to us?

A. Yes.

208 Q. And I think you mentioned the fact that trauma was the cause of ninety-nine per cent of the cases?

A. Yes.

Mr. Waitkus: That is all.

Recross Examination by Mr. Hackbert.

Q. Doctor, do I understand that a subdural hydroma will cause an interference in the individual's memory?

A. Yes.

Q. So that the recollection of a person who has had a subdural hydroma may be unreliable?

A. It may be.

Mr. Hackbert: That is all.

(And thereupon the witness was excused.)

Mr. Waitkus: Mr. Gibson.

CLAIRON VERN GIBSON, plaintiff in said cause, and a witness in his own behalf, having heretofore been duly sworn, testified as follows:

Direct Examination (resumed) by Mr. Waitkus.

209 Q. I don't believe I asked you, Mr. Gibson, what is your age today.

A. Fifty-one.

Q. What was your age when you had this blow on your head on December 12, 1951?

A. Forty-seven

Q. How much were you earning at that time?

Mr. Hackbert: Mr. Waitkus, I think we set that out exactly in the answer to the interrogatories.

The Court: Can you stipulate that?

Mr. Waitkus: Wasn't that rate different at different times?

The Court: Is it something that you can't stipulate?

Mr. Waitkus: I think, your Honor, from the information I have, that they have a sliding scale there.

A. I was receiving $14.69.

By Mr. Waitkus:

Q. $14.69 a day?

A. Yes.

Q. And as I understand, you testified there were times when you had overtime?

210 A. Yes, sir, on a Sunday or Monday, maybe.

Q. Well, did you get time and a half for overtime?

A. I believe I did; I did get overtime, yes.

Q. Now, Mr. Gibson, the floor of this shanty or building 100, did the janitor sweep that every day?

A. Every day that he was there.

Q. Well, in other words, if he wasn't there, he couldn't sweep it; is that right?

A. He couldn't sweep it if he wasn't there.

Q. Were there days when he wasn't there?

A. Yes, there were days he wasn't there.

Q. Let me ask you whether you ever used the broom.

A. Yes, I have, because when I went to back my chair to get out, to get my legs out from underneath the desk, I couldn't back it up because the rollers would be clogged, stopped from rolling by debris on the floor.

Q. At the time that you went into Billings Hospital, the fact that you had this partial paralysis on the right side, did that cause any pain to any other part of your body?

Mr. Hackbert: If the Court please, I think that is a question that the witness can't answer.

211 Mr. Waitkus: He can tell us whether he had pain.

Mr. Hackbert: Yes, if that is what you are asking him.

The Court: Well—

Mr. Peters: You are asking him, did it cause any pain.

The Court: Reframe the question.

By Mr. Waitkus:

Q. Mr. Gibson, did you have any pain?

A. I had no pain other than a headache now and then.

Q. At the time you went into the hospital, the fact that your right side was partially paralyzed, there was no pain there?

A. There was no pain.

Q. Do you have any pain today?

A. No, I don't have any pain.

Q. It is the loss of use of your right leg and hand, and the fact that your nervous system is ineffective; is that right?

Mr. Hackbert: I object to that, if the Court please. There is no evidence of his nervous system being ineffective.

212 Mr. Waitkus: I will withdraw the question.

By Mr. Waitkus:

Q. Has your nervous system been affected in any way?

Mr. Hackbert: I object to that, if the Court please. All he can describe I think is what he observes about himself.

Mr. Waitkus: To save time, I will withdraw the question.

By Mr. Waitkus:

Q. Since this blow to your head, Mr. Gibson, have you noticed that it has affected you in any other way, as far as your body is concerned?

Mr. Hackbert: I object to that. This man isn't competent to testify as to whether the blow on the head has affected him in any way.

Mr. Waitkus: I said since the time he has had the blow on the head.

The Court: Read the question.
(Question read.)
The Court: I will overrule the objection.
Mr. Waitkus: You may answer.
213 A. Yes; I have to make frequent trips to the rest room; quite often.

By Mr. Waitkus:

Q. Mr. Gibson, after you got out of the hospital at Billings, did you have any type of brace or anything prescribed for the right leg that would assist you?

A. Yes, at one appointment back at the Billings Hospital Dr. Rasmussen said that when I came back for my next appointment that if my leg didn't improve he would suggest that I—or he would equip me there at the Billings Hospital with a toe lifter, so that I wouldn't be dragging the tip of my toe all of the time, which causes me to stumble.

Q. And did you get some type of equipment for that?

A. No, sir. Dr. Rasmussen was not there when I went back, and Dr. Evans was in charge at that time; and Dr Hanna gave me my checkup when I went back; and I asked him for the toe lifter, that I wasn't improving on the lifting of my leg and the bending of my ankle, and my knee would not bend, and I asked him for the toe lifter; and he says, "What kind of an apparatus do you have on you
214 now?" Because I had some rubber bands and a belt when I had stripped for the checkup, and he noticed that. He asked me how that was helping me, and I told him that by having the belt around the middle of my waist, with the two cuts of inner tubes from an automobile tire the long way banded together at the bottom, and each side straddling my body, one to the front on my stomach and the other on my back, and it was saddled on the instep of my foot, it served as a carrier sling, to take the dead weight off of my right side on account of my leg; and then the other band which went around the back of my ankle and crossed over and looped onto the tip of my toe acted as an inducement and pulled the tip of my toe up and would make my ankle bend, because there was a pulling there, and it would give me a chance to use the other muscles to force it down. I can't pull, I can force down, but I can't pull up.

Q. Do you have that on at this time?

A. Yes, sir; I have it on now.

Q. I wonder if you might step down and show the jury the kind of contraption that you are using.

A. Would this be all right here?

Q. I don't know whether they can see you here, or
215 not.

A. This (indicating) is one strap leading up to the front of my leg, and this goes to the back, around to my back; and there is another inner tube cut crossways and bands these two together, and the end of that goes over my instep and serves as a saddle for that leg, taking the dead weight off; and then this one here comes up over the back of my ankle, and that takes the weight of the shoe off. See here? And that lifts that toe up, like that, so that it can let me drag that leg forward without catching it on anything that might be in the way, because I just have a slight pull forward, and if there is anything in there that trips me, it makes me fall, and I have had several spills, but like a wrestler, I have learned to throw myself, rather than to fall and take the consequences; I throw and land where I want to land.

Q. Mr. Gibson, you testified about bruising your shin sometime in March, of '51. Did that leave any scar?

A. Yes. Normally, it wouldn't have left a scar, but because I was injured by rust, because there was rust on the rails, the doctor felt it was necessary to be assured
216 that there would be no further complications set in, that the scabs be scraped off, and when they scraped the scabs off it left scar tissue on my legs here, and spots, those brown spots.

Q. Are these red spots from that?

A. This here is from a trip coming up from the basement; this foot I put too far forward and it got under the step, next step up, and when I bent forward it made me bend on my shin against the next step up.

Q. In other words, this is since this condition arose?

A. Yes.

Q. Mr. Gibson, I take it that you have not worked since you left the E. J. & E. on the 30th of September, 1952?

A. No, I haven't worked. I was called back by Leo Govert, called up and asked if I would come back, and I wanted to go back, but I went down to see Dr. Behn, and Dr. Behn was on his vacation, and Dr. Lorenty gave me an examination and everything, and he advised me not to go back to work.

Mr. Hackbert: I object, and move that the answer be stricken.

217 The Court: That may go out.

At least, after you went to the Doctor, did you go to work?

By Mr. Waitkus:

Q. You haven't worked since you left?

A. No, sir.

The Court: I think we will take a five-minute recess.

(A short recess was taken.)

By Mr. Waitkus:

Q. Vern, after you left the Billings Hospital or Clinic in '52, have you had any additional trouble since then with your head, that you know of?

A. Yes, I had trouble with my head in April, of 1955.

Q. What was that?

A. Well, I had a terrific headache, and I told my wife about it, and she got me some pain pills, because I had tried aspirin and it wouldn't do anything, and that's all we had in the house; and then that kept up and by Friday my headache was so bad I could hardly stand it, and in fact I was in bed, I wouldn't get up out of bed, and she tried to get hold of the doctor; she finally contacted

218 Dr. Behn, and Dr. Behn came out; that was during the middle of the week that she called Dr. Behn.

Q. Just tell us what happened.

A. Well, Dr. Behn suggested that we call Dr. Nelius; he is a neurologist, a surgeon in neurology; and the wife explained to him what I had, and he suggested that she get me down to the hospital immediately and that he would meet me down there and find out what was wrong.

Q. Was there anything done to you?

A. Yes; I was operated on, on the 27th.

Q. Of April, 1955?

A. For an abscess.

Q. Was that drained?

Mr. Hackbert: I think, if your Honor please, that the witness isn't competent to testify to what was done in the operation.

The Court: Sustained.

By Mr. Waitkus:

Q. Was that pain or pressure relieved?

A. The abscess broke in the hospital and then the Doctor operated on me the following day.

Q. Will you turn your head to the jury?
(The witness complied.)
219 Q. That indentation in your head, is that where the operation was performed?
A. Yes, the abscess was right in the wall, in the skull.
Mr. Waitkus: That is all.

Cross-Examination by Mr. Hackbert.

Q. Mr. Gibson, as I understand it, you came to work for the E. J. & E. in February, of 1951.
A. Yes, sir.
Q. Was that shortly after you came to Gary, or had you lived in Gary for some time before that?
A. I came to Gary in June. I drove from Seattle.
Q. In June, of 1950?
A. In 1950.
Q. Between June, of 1950, and February, of 1951, what was your occupation or business?
A. Manufacturer of a mineral food supplement.
Q. How long had you been engaged in that line of business?
A. Since 1947, in Seattle, Washington.
Q. You were engaged in that business in Seattle from '47 to '50; is that right?
220 A. Yes, sir.
Q. And you were in that business in Gary from June, of '50, for how long, how long did you continue to operate that business?
A. Not very long; I had a little trouble between—I don't know when the trouble started in; however, on the 1st of January, along in January, of 1951, I was informed I had no business.
Q. It didn't succeed financially?
A. My business was succeeding, but I was more or less stabbed in the back, so to speak, and my business just went kerplunk overnight.
Q. Well, what was it that caused the business to collapse then?
A. A mineral food company out of Des Moines, Iowa, tried to duplicate my mineral tablet and flooded my salesmen on the west coast with a similar tablet to mine under the same name.
Q. And that had the effect pretty much of putting you out of business?

A. Yes, sir, that made me have to go to work for immediate obligations.

Q. Now, did you continue at any time in the health
221 food business after you went to work for the E. J. & E.?

Mr. Waitkus: Just a minute. He was talking about a mineral food supplement, and now you are asking about health food. I don't know whether it is the same, or not.

By Mr. Hackbert:

Q. Well, did you continue to operate any part of that business after you went to work for the E. J. & E.?

A. Not the mineral business.

Q. Well, did you continue to operate any kind of a business in addition to your work for the E. J. & E.?

A. Yes, in the winter, in December, of 1950, I started up the Gary Health Food store at Seventh and Washington.

Q. What kind of products did you sell at the Gary Health Food Store?

A. Products?

Q. What did you sell?

A. I sold minerals and vitamins, different foods that hadn't been tampered with by industry, food industries.

Q. For how long did you continue that business?

A. The business is still continuing.

222 Q. I see. And do you do any work in connection with that business at the present time?

A. No, sir.

Q. How long has it been since you have done any work in connection with that business?

A. Since I went to work for the E. J. & E., in February, of '51.

Q. I take it that your wife is operating that business since you went to work for the E. J. & E.?

A. Yes, sir.

Q. Now, during the time that you were working for the E. J. & E., were you yourself taking vitamin pills?

A. May I answer that in my own way?

Q. Surely.

A. I sold my restaurant out in Seattle, Washington, because of ill health and not able to continue it, and the wife being pregnant, I had to sell the restaurant; and I was treated by a doctor at that time, and I had low blood pressure and a number of other minor causes, and my

blood pressure would not come up to normal, and I had to force myself to do anything because I had no desire to do anything, so my brother, who had a mineral substitute
223 that he was handling on his Watkins route that he had, had a bottle of these minerals and he told me to take and try them, and I did, and those minerals helped me out so immensely that the doctor that turned me away finally started using the minerals on his patients; so I decided then, because that had put myself back in normal condition, and lots of vim and vigor, to go into the mineral business.

Q. And you did that out in Seattle in '47, or thereabouts?

A. Yes, sir.

Q. And that was the business that you gave up, or were obliged to give up, because of competition from your source of supply in December, of 1950?

A. On or about that.

Q. What was the nature of your ill health prior to the time that you started taking this medication?

The Court: Didn't he say low blood pressure?

By Mr. Hackbert:

Q. Was low blood pressure the illness that you had when you gave up your restaurant?

A. No; no, I had three troubles when the doctor examined me.

224 Q. What were your three troubles?

A. Streptococcus infection of the throat, scarlet fever, and flu.

Q. Now, how long had you been engaged in the restaurant business in Seattle prior to 1947?

A. Approximately three and one-half years, I guess.

Q. What had been the nature of your work prior to the time you went into the restaurant business?

A. Before I want into the restaurant business?

Q. Yes.

A. The nature of my work?

Q. Yes.

A. I was the owner of a parking lot.

Q. How long were you in business as the owner of a parking lot?

A. Before I went into the restaurant business?

Q. Yes.

A. A very short time.

Q. Just a matter of a few months?
A. About a month or two.
Q. Prior to that, what had been your work?
A. I was a United States deputy collector for the Bureau of Internal Revenue.
Q. How long were you connected with the Bureau of Internal Revenue?
225 A. For approximately nine months.
Q. And before that, your work in general had been of a clerical nature, hadn't it?
A. Yes, sir.
Q. What kind of clerical work had you done prior to the time you were with the Bureau of Internal Revenue?
The Court: You mean bookkeeping, or keeping records?
Mr. Hackbert: Yes, what kind of clerical work.
The Court: That is what he means.
A. I had done numerous jobs, bookkeeping, typing, statistical work, secretarial work.

By Mr. Hackbert:

Q. Now, you first started your work for the E. J. & E. in building 100 about the middle of March, 1951. You had worked for the E. J. & E. at other jobs for a month or so, but you started on the job at building 100 in March, of 1951?
A. I don't remember when I started in building 100.
Q. Now, at the time you came to work there, had there been only one timekeeper there prior to that time, or did you replace a man who had been there?
226 A. I replaced the man who showed me the duties I had to perform.
Q. And at that time, who was the other timekeeper who was working in there?
A. Harley Dowell, D-o-w-e-l-l.
Q. And Mr. Dowell was behind in his work at the time that you started there as timekeeper?
A. I found that out.
Q. And you helped in bringing that work up to date?
A. I completed it.
Q. Was your principal function that of a timekeeper for the crews working in Kirk Yard and at the two locations out on the South Chicago branch, was being a timekeeper the principal part of your job?
A. That was what I was hired for, was timekeeper.
Q. That was your designation on the job, timekeeper?

A. That was on the bid that I was awarded.

Q. Now, in the course of that work, you had occasion to fill out these employment applications, did you not?

A. What employment applications?

Q. Well, you filled out the employment applica-
227 tions for the section laborers, didn't you?

A. Yes.

The Court: After they had been hired?

The Witness: Yes, sir.

By Mr. Hackbert:

Q. Now, you had nothing to do with hiring those men, did you?

A. No, sir.

Q. The determination as to whether or not the particular man should be hired or rejected was made by somebody before the man ever reached you; isn't that true?

A. Not exactly.

Q. Well, who was it who decided whether these men would be hired or rejected?

A. Sometimes the roadmaster right in Gary and in the accounting office building.

Q. But that determination had been made before the men were ever sent down to building 100, hadn't it?

A. No, sir.

Q. Was it made before or after?

A. It became my duty at times to send the man on up to Jake Strauss, who was authorized by the road-
228 master whether to accept the man to work, or not.

Q. Would you send him up to Jake Strauss before you filled out the form or after you filled out the form?

A. As a rule, the man was supposed to have a slip with Jake Strauss' signature designating us to put the man to work.

Q. That's right. In the ordinary case, the man, when he came to you, had a slip showing that he had been hired by the E. J. & E.?

A. Except those coming in from Indiana Harbor and Buffington.

Q. I am not talking about the crews that were working out on the mainline to South Chicago; I am talking about the crews working in Kirk Yard. Those men, when they came to you, had a slip showing that they had already been hired?

A. Yes, but these others had to be dealt with, too.

Q. Well, so far as the crews that were working at Indiana Harbor and Buffington, those were smaller crews and much more steady employees, were they not?

A. Not necessarily, sir.

Q. Well, they were smaller crews, weren't they?

A. They were smaller crews, yes, sir.

229 Q. In other words, there were perhaps six to eight men in one of those gangs?

A. Yes.

Q. Now, the men who were being hired for work in Kirk Yard were being hired primarily because of the construction of the new hump yard, were they not?

A. The majority of the men were, yes.

Q. And you yourself made no determination as to whether those men who were applying for work in that connection should be hired, or not?

A. Not other than referring them to Jake Strauss or Mr. Paige or Bob Dangremond for employment.

Q. Now, some of these men who came and applied for work currently had previously worked for the E. J. & E.?

A. Not one hundred per cent.

Q. No, I understand that, Mr. Gibson. If you will just listen to my question. Some of the men who came to be put to work had previously worked for the E. J. & E., and you already had application forms on file for them, isn't that true, as to some of the men?

A. Some of the men, yes, sir.

Q. And the only men for whom you had to fill out
230 an application form were the men who were coming to work for the E. J. & E. for the first time?

A. Yes, sir.

Q. And this labor force that was working there in the extra gangs at Kirk Yard in the construction of the new hump yard were fellows who worked for a while, quit, came back, worked for a while, and quit again, kind of a floating supply of work, were they not, for the most part?

A. For some of the men.

Q. And some of the men were steady employees who had been there for a long time?

A. Those on the payroll were steady employees, but often some of those would quit at times.

Q. And then they would come back again?

A Yes, sir.

Q. Now, the foreman of each different crew would

give you a report every day as to the men who were working in his gang that day, wouldn't he?

A. No, sir.

Q. How frequently would the foremen give you a report of the men who were working for them?

A. Generally, the next morning.

Q. Yes, but you would get a report every day as
231 to what men were at work; it might be the men who had worked the previous day, or it might be the men who were working that day?

A. No, sir; I wouldn't get them every day that way.

Q. How would you get them?

A. Sometimes there would be two days, and it went as high as three days sometimes before I got a report from some of the foremen.

Q. Would they turn in the reports ordinarily to you at the beginning of the day's work or at the end of the day's work?

A. Very rarely at the end of the day. It would be the next morning, as a rule.

Q. Generally the time that the section foremen came in with their reports was early in the morning?

A. With the exception of Indiana Harbor and Rodriguez's crew.

Q. That was the crew at Buffington?

A. Yes.

Q. Those were the regular crews?

A. Those were permanent crews at that assignment.

Q. And those men turned their reports in how, those foremen?

232 A. If anyone might happen to go out there and see the foreman, and was coming back into Kirk Yard, he would endeavor to get them in to me. Sometimes that went four or five days before I ever got any of them.

Q. So far as those small gangs out on the road were concerned, you knew that they generally worked five days a week?

A. Yes, but I could never put their time down until I got their record on employment.

Q. When you got the records every few days, however often it might be, you were then in a position to put that information down on the payroll sheet?

A. Yes, sir.

Q. So far as these payrolls that have been marked Plaintiff's Exhibit 8, the man's name, his number, the number

of hours worked per day, the total time, the rate, and total wages, that is all in your handwriting, is it not?

A. Yes, sir, that looks like my handwriting.

Q. Would you say that these payrolls are typical of the kind of payrolls you filled out during the period of time you were working as timekeeper there at building 100?

233 A. Except that this is a small payroll compared to the other payrolls I had.

Q. Well, for the first half of December, 1951, these sheets that we have here are the entire payroll for that payroll period, so far as your crews are concerned, are they not?

A. For that period, yes, sir.

Q. Now, almost without exception, the number of hours put in by each individual man is eight hours a day, is it not?

A. As a rule.

Q. As a rule. And as a rule, the most that any man worked was five days a week?

A. Not necessarily, Mr. Hackbert.

Q. I am talking about this particular payroll that we have in front of us.

A. No.

The Court: Wouldn't it be self-evident? It is in.

Mr. Hackbert: I think perhaps your Honor is right.

The Witness: I think there is also some overtime in there.

Mr. Waitkus: Wasn't that introduced?

234 Mr. Hackbert: It was introduced, yes.

The Court: It is in evidence.

By Mr. Hackbert:

Q. So far as the section laborers were concerned, at the time of this payroll, almost without exception the hourly rate is $1.453 per hour, is it not?

A. It could be.

Q. All six of them on the first page, all six of them on the second page?

A. Yes, sir.

Q. All except one, apparently a special three-hour job, on the third page.

A. This was Kirk Yard.

Q. Yes. Now, the information that is contained on these sheets would come in to you from various foremen from time to time during the month?

A. What do you mean, from time to time, sir?

Q. Well, the foremen on the crews that were working in Kirk Yard, the big crews, they would turn in their reports to you every day, or at least every two or three days, during the course of the half month, would they not?

A. Yes, sir, every day.

Q. Every day they would turn it in to you?

235 A. Except at times.

Q. Except at times. There would always be some times when a report doesn't get in, but the normal course of things was for the time information to be turned in to you by each foreman daily?

A. Yes, sir.

Q. So that starting on the 2nd of the month, or the 3rd of the month, you would begin to receive from the foremen the information that was ultimately copied onto these payroll sheets?

A. Yes, sir.

Q. And the thing that there was a rush about at the end of the payroll period was getting in the entries for the last few days, projecting the probable days to be worked between then and in this case the 15th of the month, and then multiplying out the number of hours worked by the hourly rate.

A. We had to do a lot of anticipating, sir, in closing out the payroll.

Q. Yes. The anticipating that you would do would be anticipating whether or not these men would work; going back specifically to this particular payroll that you were making out on the night of December 12th, you would have to anticipate what men would work on the 13th,

236 14th, and 15th in order to complete the payroll; is that right?

A. Yes, sir.

Q. Now, this particular payroll that you worked on on the night of December 12, 1951, at what time on the following day, December 13th, would you turn this payroll in to someone?

A. I don't remember when I turned that payroll in, sir.

Q. Well, what was the usual practice?

A. As soon as we completed it, we would turn it in.

Q. Would you have all of the d[illegible] of the 13th in this case, to get the payroll in to the person to whom it was supposed to go?

A. You mean all of the time for the men in the payroll?

Q. No, I mean this: You worked overtime the night of December 12th. I take it that the payroll had to be in somebody else's hands on December 13th, then.

A. Yes, sir.

Q. Now, was it your practice to get it to this other person the morning of the 13th or toward the end of your working day on the 13th?

237 A. We were supposed to get it in the first thing in the morning, if it were possible to get it there.

Q. And to whom would you turn this payroll over?

A. I don't know; some accountant, some timekeeper, someone in the office.

Q. You turned it in to the main office at Kirk Yard?

A. At the accounting office.

Q. If, after the payroll had been turned in, it came to your attention from the report of a foreman, or otherwise, that you had marked somebody up as working on the 14th or 15th when in fact he didn't work, I take it that you would transmit that information to someone to whom the payroll had gone by that time?

A. We had to do some of that before we even turned the payroll loose, sir.

Q. On the 13th, it was possible, of course, for you to learn the identity of any man who had not worked on the 13th, but whom you had expected to work?

A. Yes, but—

The Court: How is this so important, I mean these minute details, are they material?

238 Mr. Hackbert: Well, I think they are, if your Honor please. I wanted them simply to show a couple of examples here.

By Mr. Hackbert:

Q. For instance, Mr. Gibson, on the second page of this exhibit, in the tabulation of wages for Mr. F. Flores, the 8 hours on the 14th is crossed off and the total time in the next column is reduced from 80 hours to 72 hours. I take it that that indicates that although you had expected Flores to work on the 14th, he didn't?

A. That's right.

Q. And you would telephone that information then in to someone, and they would change the payroll sheet accordingly?

A. That's not my writing; this is not my writing, so I must have telephoned the change in.

Q. That's right. The changed figures here in blue pencil are not yours?

A. Not mine.

Q. And that's the way in which the payroll sheets would be corrected in the event that a man didn't work when you expected that he was going to work; is that right?

239 A. That's when the accounting office made the change, yes, sir.

Q. Would you do the proving of these sheets? I notice that the total time for each individual is added out in one of the columns near the right-hand margin, and then the total time of the crew per day is added vertically under each day. For instance, on this first page, the total 424 here; you add this column of figures and this column of figures and ascertain if you have correctly accounted for all of the hours, I take it.

A. I did all of that, sir.

Q. Yes. And I take it that the initials up here, opposite the box containing the word "Figured," are your initials, to indicate that you were the one who made out the sheet?

A. If "CVG" is there, it is mine. Yes, that's mine. And the rest is the others that checked it in the accounting office.

Q. Checked it in the accounting office after it had left your hands?

A. Yes, sir.

Q. Now, you got out these payrolls twice a month?

A. Yes, sir.

240 Q. And you knew always that along about two or three or four days before the end of the half month that you would get word as to the day on which the payrolls were to be in; that word always came through at about that same time of the month; didn't it?

A. We generally knew about what time to figure the word would come through.

Q. Yes. It might be a day one way or the other, but it would be approximately the same time twice a month?

A. Except when they failed us and made it three days.

Q. I say one day one way or the other from the day you expected it.

Now, would you work on these payrolls currently dur-

ing the ten or twelve days preceding the time when you got the word to turn the reports in?

A. I would always work on the payroll at any time I had the figures or after I checked my men to find out if they worked that day and I could devote any time; if I wasn't pressed on other duties I had to do, then I would work on my payroll.

Q. In other words, the preparation of this payroll was a job that you had in process, off and on, all during
241 the half month period?

A. But that had to be dropped, at times.

Q. Yes; at times there were other things that you had to do.

A. Yes, sir.

Q. But this job was one that was continuing all through the month.

A. That was the most important job.

Q. Now, in your capacity as timekeeper, you had nothing to say as to which men should work on particular jobs or on particular days, did you, that was no part of your responsibility?

A. No; except when a man worked over 16 hours, I had to notify the track supervisor or the foreman.

Q. When the word came in to you that a man had worked over 16 hours in a 24-hour period, you would notify someone of that fact?

A. When I noticed it on my payroll, yes, on my time book.

Q. How often would that happen?

A. Not too often, sir.

Q. The instructions to the foremen as to what their work was to be during the course of the day was given to them early in the morning either by Mr. Schramm
242 or by Mr. Dangremond?

A. Yes, sir.

Q. So far as these payroll sheets are concerned, these are made up of information supplied to you by the foremen as to which men were working, and information which you gathered by going out into the field and checking the crews which were working there?

A. Yes, sir.

Q. How frequently would the foremen turn in to you the information which was used to make up the monthly distribution sheets?

A. That came in on the daily foreman's report.

Q. In other words, the foreman's daily report would show what material they had used that day?

A. Yes, sir.

Q. Now, was the monthly distribution sheet, when made up, simply a total of all of the material that had been used in each classification during the month, or was it day by day, like the payroll records?

A. It was what they done day by day. We computed it.

Q. Similarly, then, the monthly distribution sheets, that was something you could work on from day to day during the month?

243 A. Yes, sir, as the reports came in.

Q. Now, building 100 was the center or the headquarters for the yard construction and maintenance workers there at Kirk Yard, was it not?

A. It was the headquarters, yes, for the B. & B. Department and the maintenance of way.

Q. And the maintenance of way work there in Kirk Yard was under the immediate direction of Mr. Schramm?

A. Maintenance of way, yes, sir.

Q. And Mr. Dangremond was the man who was in charge of the new construction work of the hump yard?

A. Yes, sir.

Q. And that was the office to which the foremen who were in charge of the gangs doing those two kinds of work reported and got their instructions?

A. To Mr. Schramm's office or Mr. Dangremond's office.

Q. Well, to building 100, that was the place where they reported and got their orders?

A. That is where they reported, but it wasn't Mr. Dangremond's office.

Q. Well, I understand that, but Mr. Dangremond would frequently be there early in the morning to give them any special instructions that he had?

244 A. Yes; as a rule, he was always there.

Q. Now, you also made out accident reports for any maintenance of way worker or any of the men working on the section crews who was injured during the course of the day's work?

A. Yes, sir.

Q. And you made out accident reports for all classes of accidents from trivial accidents to serious accidents, did you not?

A. Yes, sir.

Q. And it was the practice to make out an accident report in every accident in which a man had been hurt on the job, was it not?

A. Yes, sir.

Q. Might even be something as simple as getting a cinder or something in his eye?

A. Yes, sir, or drunk and hurt downtown.

Q. When a man had been hurt on the job, it was the practice to send him to the hospital for attention?

A. Yes, sir.

Q. And the hospital was the Steel Company hospital there on Broadway opposite the main plant office, was it not?

245 A. Yes, sir.

Q. And at that hospital the doctors and nurses and attending staff treated the E. J. & E. employees, as well as the Steel Company employees?

A. Yes, sir.

Q. That hospital was in operation 24 hours a day, was it not?

A. At one time I didn't know that.

Q. Well, but you do know that now?

A. I know it now.

Q. And you knew it when you were working out there in building 100, didn't you?

A. Yes, sir.

Q. And you knew that that hospital was in operation on Saturday and Sunday, as well as the other days of the week?

The Court: How is that important?

Mr. Hackbert: Well, that may not be, if the Court please.

By Mr. Hackbert:

Q. You had learned from your previous accident that you had that you could go there to the hospital for attention as an E. J. & E. employee even with respect to an accident that you reported several days after it oc-
246 curred; you had learned that in the course of that earlier accident when you fell on the rail, hadn't you?

A. On that one, yes.

Q. So that on December 12th and 13th, 1951, you knew that if you had been hurt on the job you could go there to the hospital during working hours for whatever medical

attention was indicated or required, didn't you; you knew that from your experience in the handling of accident reports of injured section laborers before that time, didn't you?

A. I knew I could send a man to the hospital at any time that I received word of his injuries.

Q. And you knew that if you were injured, you could go to the hospital for attention?

A. I had the same right.

Q. Now, did you ever make out and turn in a report of this incident of your bumping your head on the underside of the desk?

A. No, sir.

Q. And yet in the course of your work there in building 100 prior to that time, you had made out an accident report for every accident that was reported to you to an E. J. & E. employee, no matter how trivial that
247 accident was; isn't that the fact?

A. What is the question?

(Question read.)

A. Yes, sir.

Q. And prior to that time it had been your experience that no matter how trivial the consequences of an accident, that an E. J. & E. employee could go to the hospital for medical attention at any time; you knew that, too, didn't you?

A. Yes, sir.

Q. And you never went to the company doctors at the hospital at all at any time following this incident of bumping your head on the desk, did you?

A. I didn't realize I had any accident, sir.

Q. Well, you knew you had bumped your head, didn't you?

A. I never gave it a thought. After the pain left and my sight came back, I forgot all about it.

Q. Well, your head ached the next day, didn't it?

A. I imagine so, but I thought it was from indigestion, probably.

Q. And your head ached the day after that, didn't it?

A. I don't remember, sir.

248 Q. Well, as a matter of fact, you didn't think very much about this bump on your head after it occurred, did you?

A. I never gave much thought to it.

Q. After you sat there for a little bit of time, you got into your car, and you drove Marjanian home, and then you went home; is that right?

A. Yes, sir.

Q. And when you came back to work the next day, it didn't occur to you that any ill feeling that you had or any headache was connected in any way with that bumping of your head?

A. No, sir.

Q. Now, the only time in the course of your work that you had any occasion to use an adding machine was on the one or two days when you were completing these payroll reports, was it not?

A. Yes, when we had to turn the payrolls in.

Q. Now, Mr. Gibson, will you look at Plaintiff's Exhibit 8, and tell me what figures it was that you were required to use an adding machine in order to total them up?

A. In proving the work, in proving the hours.

Q. When you say, in proving the hours, what tabu-
249 lation do you mean? Taking the first sheet there of Plaintiff's Exhibit 8, will you tell us what figures you ran off on your adding machine in order to reach any totals?

A. We always used the adding machine on this to facilitate turning in the payroll.

Q. When you say "on this," you mean—

A. On the total.

Q. —the column showing total wages for each man?

A. Yes, sir.

Q. Did you use the adding machine to total up any other columns of figures on the first page?

A. Yes, the hours at the bottom, as well as the hours extended over across, in order to prove the work.

Q. In other words, the column of figures under "Total Time," totaling 424, and the column of figures running from left to right across the page, beginning with 48 and ending with 32, the total of the hours for the individual days for the crew; is that right?

A. Yes, sir.

Q. So that on this first page of this exhibit there were one, two, three matters of addition for which you
250 would use the adding machine?

A. Yes, sir.

Q. And that's all that you would use the adding ma-

chine for in making out that first sheet of Plaintiff's Exhibit 8?

A. Yes, but that wasn't all, sir. We had to recap the whole thing, had to take every figure there at the bottom and recap the hours as well as the wages.

Q. In other words, you would do that for each sheet, you would do the same thing for each sheet in this total collection of 21 pages; is that right?

A. Yes, sir.

Q. Now, turning to what is indicated as sheet #6 of 6, in the crew of C. Roop as foreman—well, those figures have been changed.

The Court: How is this important? I don't want to—

Mr. Hackbert: Well, we have the question of the volume of work that he claims he has to do, to have an adding machine for, and I want to show what that is, if the Court please.

By Mr. Hackbert:

Q. Turning, Mr. Gibson, to sheet #5 of 5 in the
251 crew of R. Flores, the figures that appear on that sheet, are those calculations made and recorded by you, or are those made by somebody else?

A. They were made by myself.

Q. And would you use the adding machine in totaling up those columns of figures as they appear on that page?

A. Not on small figures, sir.

The Court: I don't want to get into it too far, but is it one of your contentions, regardless of any others, that he need not have an adding machine, that it was not necessary to have an adding machine?

Mr. Hackbert: Well, the complaint alleges a necessity for having an adding machine, charges us with negligence in not having furnished him with one. My purpose is to show the very limited character of the work that would call for an adding machine on two occasions a month.

The Court: All right.

By Mr. Hackbert:

Q. As I understand it, Mr. Gibson, when you would start work in the morning, the first thing that you
252 would do would be to go out and check the crews in the field rather than to report to building 100?

A. There were times I did that, sir.

Q. How often would you say in the course of a month's

time you would begin your day's work by checking crews in the field and how many times would you begin by starting out in building 100?

A. Because I lived closer to the west end of Kirk Yard, closer to Clark Road than Buchanan, I would come in through Clark Road to Kirk Yard.

Q. You would be driving your own car?

A. I would be driving my own car.

Q. And you would check the various locations where crews were working on your way to building 100?

A. On my way in, yes, sir.

Q. Now, by that time the foremen had already been into the building and received their orders for that day's work, had they?

A. Some of them had, and some received them over the phone by calling in.

Q. And by that time, the foremen had already turned in their reports to building 100 of their previous day's work?

A. No, sir, they had not.

253 Q. When would they turn those in during the day?

A. I would wait for them to make it out and turn it in to me.

Q. When would they do that?

A. When I came by to check the men, that morning.

Q. Oh, you would pick the reports up from the foremen when you came by; is that right?

A. Yes, sir, for the previous day; and then I would check my men as they went to work, because I was right there.

Q. So that there wasn't any occasion then for those foremen to come into building 100 to turn over any reports or lists of men working to you?

A. No, because I picked it up.

Q. Now, how many truck drivers were reporting at building 100 for instructions in connection with their work?

A. I don't remember, sir; three or four, I imagine.

Q. And how many other employees were there working under the supervision of either Mr. Schramm or Mr. Dangremond who had occasion to report regularly to building 100 at the start of their morning's work for orders?

254 A. All of the foremen that were in the immediate vicinity of building 100, and some of them that their foreman's shanty was lying out a ways would report in.

Q. In December, 1951, how many foremen were there working in Kirk Yard who would report at building 100 at the start of the morning's work?

A. In the first period of December?

Q. Yes.

A. How many foremen?

Q. Yes.

A. There was—I had four foremen in Kirk Yard, and George Marjanian had four foremen in Kirk Yard, and they all reported in with the possible exception of Mr. Gradle now and then.

Q. Now, would those eight foremen report again late in the afternoon or would they wait until the following morning to come in and report the men who had worked the preceding day?

A. Mr. Schramm's brother tried to get his report in that night.

Mr. Hackbert: No, Mr. Gibson; just listen to my question; just answer my question.

The Court: Again, I don't want to go into this too far, but what is the importance of this?

Mr. Hackbert: Well, if your Honor please, they
255 tell the story of all these men congregating in there, hanging around all day long. I want to find out just exactly how many men there were and how often they had occasion to come in during the day, and at what times.

The Court: How many foremen; when did they come in, and how many, about? You don't have to be exact. When did they come in, how many in the morning and how many later on in the day? We are talking just about foremen now.

The Witness: There were five or six foremen, and there—

The Court: I mean total, not yours, not this other man's, but altogether.

The Witness: Well, I would say there were five or six foremen, plus Mr. Schramm's assistant.

The Court: In the morning, they got in there in the morning?

The Witness: They always came in in the morning.

The Court: All right.

256 Now, in the afternoon, how many came in?

The Witness: Five or six of the foremen, plus Mr. Schramm's assistant.

By Mr. Hackbert:

Q. So the foremen would come in in the morning, and again in the afternoon; is that right?

A. Yes, sir.

Q. Now, besides the foremen, how many men were there in the first half of December, 1951, who regularly came to the building 100 either once or twice a day to report or get orders or for any other purpose in connection with their work?

A. Repeat the question, please.

The Court: Well, let's not think about the foremen, not think about the truck drivers. Who else came to that building during the day, during that period in December?

The Witness: Well, the truck drivers.

The Court: Let's leave them out, and leave out the foremen. Was there anybody else who came into the building?

The Witness: The welders, the burners, the oil man, the oil burner, the weed burner, messengers coming
257 in from the foremen—possibly, if a foreman didn't come in with his daily report, an outlying foreman would send it in by messenger or gandy.

By Mr. Hackbert:

Q. Now, how many men all told of that kind that you have just been telling us about would there be who would come into the building during the course of your eight hours on duty there?

The Court: On the average?

Mr. Hackbert: On the average.

The Court: Your best judgment.

A. There was always B & B. men coming in there.

By Mr. Hackbert:

Q. I am not talking about them; they came into the other room.

A. They came tracking through our department.

Mr. Waitkus: He said they came in there. If they were going through there, let's get them in.

By Mr. Hackbert:

Q. How many men came in in your side of the building on the average during the day, other than the foremen and the truck drivers?

258 A. I can't say. You are pinning me down to where I can't answer that question. I can't say how many men came in.

The Court: We don't mean with any exact mathematical precision, but on the average, how many people would you say came in there? If you have any judgment on it, or remembrance, or idea about it, how many would you say; other than the truck drivers and the foremen, do you have any idea how many people?

The Witness: Well, 20-25, maybe.

By Mr. Hackbert:

Q. Now, on all days of the month, other than the night when you were working overtime to make out the payroll, all of those men would be in and out of that building, and the building would be closed at 4:30; is that right?

A. Yes. We—

Q. And between 4:30 and the time you started working the following morning, a janitor regularly, maybe missing some days now and then, but regularly there was a janitor assigned to come in and clean up the building between 4:30 and the starting time the next morning, wasn't there?

259 A. No, sir.

Q. Wasn't there a regular assignment of the janitor to come in that way in the morning?

A. There was an assignment for the janitor to come in in the morning, but not after 4:30.

Q. I don't mean after 4:30 in the afternoon.

A. That's what you said.

Q. But after the building had been closed at 4:30, and before the crews started to work in the morning, the janitor would come in there the first thing in the morning and clean up that building, wouldn't he?

A. No, sir.

The Court: Well, you say some time in the morning, but you say after 4:30. That's rather vague, it seems to me. I am not trying to criticize your question, but it seems to me that it lends itself to two kinds of interpretation.

By Mr. Hackbert:

Q. Let me put it this way.

Some time between the time you left at 4:30 in the afternoon and the time you came back to building 100, at eight

o'clock, or whenever you did arrive, in the morning,
260 the building had been cleaned by the janitor, in the normal course of events?

A. I don't know, sir.

Q. The janitor customarily came in some time in the early part of the afternoon and cleaned the building, didn't he?

A. He came in—no, he quit at two o'clock.

Q. Well, before he quit at two o'clock, he swept the building again, didn't he?

A. As a rule, he swept just before he left.

Q. And as a rule, he also swept the building before people started to work in it in the morning?

A. No, sir.

Q. Did he ever sweep the building out before people started to work in it in the morning?

A. When he wasn't assigned on other duties, if some other janitor was not sick or didn't show up, and if he showed up at our place, he swept out building 100 after the men went out to work, assigned to their duties by the track supervisor.

Q. Now, at what time of the morning would it be that he would sweep out the building in the morning after the men had been in to get their orders?

A. Well, that might be about 9:30.

Q. And then he would customarily or usually sweep
261 out the building again in the afternoon just before he quit for the day; is that right?

A. About one thirty or a quarter of two.

Q. So that as a matter of the regular procedure—there may have been some days when it didn't happen—but as a matter of the regular procedure there, the building was swept out after these men had been in there early in the morning to get their orders, and again it was swept out after the lunch hour at noon?

A. Yes, sir.

Q. Now, so far as this particular day of December 12, 1951, do you have any recollection of what time the janitor was in there that particular day?

A. I don't remember, sir.

Q. You wouldn't say that that was one of the days that he wasn't there?

A. I wouldn't say that he was there, either, sir.

Q. So far as the men who came in to turn in their reports or get orders or anything else that day, so far as

you now recall, was there anything unusual in the number of men who came into the building that particular day?

A. Yes, sir.

Q. What?

262 A. All of the B. & B. Department, the maintenance of way, and every man working there, and under Joe Schramm, as well as under my section foremen, were notified that the reports must be turned in in advance of their day's work for the next two or three days, whichever the case may be, before the end of the payroll time that it was supposed to be turned in, that they had to turn in their reports, so those always came in towards the end of the day.

Q. Do you recall anything about the weather conditions that day?

A. I can't recall that, sir.

Q. Now, I take it that on a day like that, when you were engaged in getting out this payroll, trying to finish up before you left for home that night, you would spend as much time as possible working on the payroll?

A. Oh, yes. I always had to take the payroll home at night, after I got through work.

Q. Did you take the payroll home that night?

A. I can't remember, sir.

Q. But so far as that day is concerned, when you were getting out the payroll, you wouldn't make any useless trips away from building 100, would you?

263 A. I never left it.

Q. You were there in building 100 all that day, were you?

A. Previous to turning in the payroll?

Q. Until the time you left the building that night at 8 or 8:30, were you there in the building all day from the time you reported to work in the morning until you left there in your car that night?

A. No, sir; I had to go out and check the men that afternoon.

Q. How many times did you go out of the office to check the men?

A. I never went out until right after lunch.

The Court: Well, whenever you went out, how many times would you say you went out?

The Witness: Once. I had to circle Kirk Yard.

By Mr. Hackbert:

Q. I take it you did that in your automobile?

A. Yes, sir.

Q. About how long did that take?

The Court: Approximately.

A. Well, I might be able to get it done in three-quarters of an hour.

264 Q. Were there any reports turned in that you had to work with during the period of time that you were gone that afternoon?

A. Those slips were always set to one side, unless it was an injury.

Q. Were there any reports turned in during your absence that afternoon?

The Court: If you remember.

Mr. Hackbert: If you remember.

A. I can't remember.

By Mr. Hackbert:

Q. Do you remember whether or not you filled out any accident reports that afternoon?

A. I can't remember.

Q. Do you remember whether or not you filled out any applications for employment that day?

A. As to that day, I can't remember. I did before.

Q. Now, if you filled out an application report on that date, December 12th, would that man be shown on the payroll record as having started to work on that day, or would he start the following day?

A. They would be carry-overs, sir.

The Court: How important is that point?

265 Mr. Hackbert: Well, I want to see if there is any way of determining from the payroll record as to whether or not he filled out any application forms on that day.

The Court: Suppose he did.

Mr. Hackbert: I want to find out the amount of time. We are charged with having overburdened this man with work. I want to find out what the fact is.

By Mr. Hackbert:

Q. If a man was hired on December 12th, and you filled out an application form for him on that day, would that man report to the foreman for work that day, and show

up on the payroll as having started to work and worked eight hours on December 12th?

A. If he went to work that morning, we put him on the payroll.

Q. Was it customary for the men to go to work the same morning that they applied for work?

A. Yes; yes.

Q. I take it that during the time that you were there working in building 100 that day, you were working at your desk?

A. Yes, sir.

266 Q. No one else was sitting there at your desk while you were there?

A. They couldn't be sitting there when I was there, sir.

Q. Now, do you remember whether or not you ate lunch there that day at your desk?

A. I generally ate lunch at building 100, and ate at my desk.

Q. So far as you recall, that was true on this particular day, December 12th?

A. Unless I went to the rest room, sir.

Q. Do you have any recollection now as to whether or not you followed your usual practice of eating at your desk, or whether you went to the restaurant?

A. I said unless I went to the rest room.

Q. Do you have any recollection about that day?

The Court: He says he is talking about a rest room. Isn't that what you said?

The Witness: Yes, sir.

The Court: He said rest room, and you said restaurant.

Mr. Hackbert: Oh, I'm sorry.

By Mr. Hackbert:

Q. You might leave building 100 for the purpose 267 of going to the toilet; is that right?

A. And when I came back, my desk would be occupied.

Q. Do you have any recollection of anybody else sitting at your desk on December 12, 1951?

A. I can't swear to that day.

Mr. Waitkus: It is obvious; the man said—

Mr. Peters: We are charged here with inadequate equipment.

The Court: Ask another question.

By Mr. Hackbert:

Q. When these foremen came in or anyone else came in for the purpose of turning over any report or anything else to you, they would have no occasion to go behind your desk, would they, while you were sitting there?

A. Yes, they would.

Q. What occasion would they have to go behind your desk?

A. For one reason, to look at the telephone directory.

Q. Do you have any recollection of anybody coming in to look at the telephone directory on December 12, 1951, behind your desk?

268 A. That's over three and one-half years ago, sir.

Q. Where was the telephone kept in that office?

A. In the middle of the desk, between Mr. Schramm's and my desk.

Q. On these occasions when you would have to relay messages to someone else, that would be when a message came in for Mr. Schramm or Mr. Dangremond, or some foreman who was working in the vicinity of building 100; is that right?

A. Yes, sir.

Q. And your only function in that connection was, if there wasn't a messenger there, that you or Marjanian would see that the message was relayed to the man that it was intended for?

A. Yes, sir.

Q. You yourself had no occasion to go out into the yard and give orders to anyone that originated with you, did you?

A. Only when I was notified to give the orders, sir.

Q. That would be merely a case of your relaying on the order that somebody else had told you to?

A. Yes, sir.

269 Q. Now, on this particular occasion, December 12, 1951, you and Marjanian were each using an adding machine; were you not?

A. Yes, sir.

Q. You were using your own machine?

A. Yes, sir.

Q. And at the conclusion of your work that night, you had put that machine on Marjanian's desk; is that right?

A. Yes, sir.

Q. And it was the machine that Marjanian had bor-

rowed from Brown Company that you were putting underneath your desk?

A. Upon his request.

Q. Now, was it customary for you to return that machine to the Brown Company's office, or to the Brown Company's camp, at night or only during working hours?

A. As a rule, Mr. Marjanian tried to get that adding machine back to Mr. Brown—to the clerk that he borrowed it from at Mr. Brown's boarding camp.

Q. And to get it back to him when?

A. When he got through using it, because they needed that machine themselves, and were just treating it as a favor to Mr. Marjanian to let him use the adding ma-
270 chine, and then he must get it back. On that night he couldn't get it back.

Q. Why couldn't he get it back to the Brown Company that night?

A. Because evidently the clerk had finished his work and had went out and the place was locked up; he couldn't get in.

Q. How did you know that the Brown Company's place was locked up that night?

A. I don't recall, sir, whether we called on the telephone or whether George Marjanian went over there with the adding machine; I don't remember.

Q. How many times before this had either one of you put an adding machine under the desk?

A. I don't remember of ever putting it there before, sir.

Q. You were taking your machine home?

A. Yes, sir.

Q. You were through with your machine?

A. Yes, sir.

Q. During the course of your work there as a timekeeper at building 100, how many times, if ever, had you gone up to the accounting office to use the machines there during the regular working day?

271 A. I don't remember of going up and using their machines other than when we turned the payrolls in the following day.

Q. Would you sometimes use their machines in order to complete any calculations on the day that you turned the payrolls in?

A. Yes, because we were called up every fifteen or twenty minutes from the time of eight o'clock, when we

started to work, until the time we got there with our payrolls, to come up with the payrolls, and we had to notify them we absolutely couldn't come up at that time, but would be up there as soon as we could accomplish our work.

Q. And you would occasionally go up there on those days and use their machines, would you, in order to complete the payrolls?

A. Only after we got all of the information from the field so that we could carry it with us and complete the payrolls at the office, and then we used the adding machines up there.

Q. How many adding machines were there there?

A. Not enough, sir, on payroll day.

Q. How many were there?

A. I don't know. It seemed like everybody up
272 there at the desk had an adding machine, but there was a lot of desks that didn't have any adding machines and they used them to work on.

Q. Can you give us any idea whether there were two or three, six or eight, ten or twelve, how many adding machines?

A. I would say there was more than four.

Q. How many other timekeepers were there besides you and Marjanian who had occasion to turn in payrolls at about this same time, working there in Kirk Yard, I mean.

A. Oh, we were, I believe—I don't know, sir; there could have been Ted Moore and another man.

Q. You say there could have been Ted Moore—

A. No, I believe there was George Marjanian and myself.

The Court: He said Ted Moore, not ten more.

Mr. Hackbert: I thought it was a name, Ted Moore.

The Witness: Ted Moore. He was a timekeeper, but he got laid off. In December, I think there was George Marjanian and myself out of Kirk Yard.

273 By Mr. Hackbert:

Q. Going back, Mr. Gibson, to the circumstances of the particular occasion, do you remember Mr. Cogswell coming to Mr. Waitkus' office and taking a statement from you on January 13, 1953?

A. You mean the time we came up there to make a settlement?

Q. The time he came up there to talk to you about the circumstances of your accident and your claim.

A. Yes, I recall Mr. Cogswell coming up to Mr. Waitkus's office.

Q. And at that time he asked you some questions about this occurrence, and you answered the questions; is that right?

A. Yes, sir.

Q. And that was taken down on a recording machine, was it not?

A. Yes, sir.

Q. Do you recall that at that time in Mr. Waitkus' office Mr. Cogswell asked you this question, and you made this answer:

Question, "Now, in your own words, would you tell me just exactly what occurred to you at that time?" Referring to approximately December 13, 1951.

And you answered, "Well, on December 13, approx-
274 imately December 13, I was working overtime on the payrolls, and George Marjanian was working with me, in building 100 at Kirk Yard in Gary, Indiana. We got our work approximately done, was cleaning up, and we had to borrow an adding machine that George asked me to put underneath my desk, so I shoved the adding machine underneath the desk, and when I backed out, I didn't back out far enough, and when I lifted up, I cracked my head upon the top of the desk drawer."

Do you remember being asked that question and making that answer at that time?

A. I can't remember whether I said I was backing out, or not.

Q. Do you remember whether you answered that question substantially that same way in Mr. Waitkus's office?

A. I can't remember all of it.

Q. Do you remember that subsequently, on April 29, 1954, I came to Mr. Waitkus's office in the afternoon, and we took your deposition before Helen Stanton, a notary public; do you remember that, about a year and a half ago?

A. That was the first time I met you, wasnt' it?

Q. Yes.

A. Yes, it seems like I recall that.

Q. Do you remember that at that time--

275 Mr. Waitkus: What page is that?

Mr. Hackbert: 57½.

By Mr. Hackbert:

Q. In answer to a question of mine about, "Well, what had you been doing just before and what happened at the time you bumped your head"—which is on page 57, that is where the question starts—you said—and this is at the bottom of page 57½—"I got that (referring to the adding machine) in and I backed up; I scooted out and then I don't know how it happened; all I do know and do remember is that in backing out in that stooped position my one foot must have slipped, and, catching myself, I must have straightened up, and then I banged my head up there and everything went blank, and a terrific pain shot through my head".

Do you remember saying that at that time?

A. It sounds familiar, sir.

Q. Do you remember—this is page 61—that I asked you this question: "Going back a minute to the time you said your foot slipped, which foot was it, do you remember?"

You answered, "I can't tell you."

Question, "Do you know what it slipped on?"

276 You answered, "I couldn't tell you; I don't remember; I don't remember what it slipped on, other than just grime on the floor or maybe grease."

Do you remember answering those questions in that way?

A. Yes, that sounds like what I said.

Q. Do you remember that I asked you this, referring to the janitor:

Question, "He cleaned the building once in the day before you came to work?"

Answer, "Yes".

Question, "He came in once again during the day; is that right?"

Answer, "Yes, because I think that was Tom Bagoff that had that job there, and he always tried to keep the place clean, but he had different spots than that to keep clean."

Mr. Waitkus: What page?

Mr. Hackbert: The bottom of page 61.

By Mr. Hackbert:

Q. Do you remember answering those questions in that way?

A. That sounds like what I said, sir.

277 The Court: Are you going to have some more?

Mr. Hackbert: I think so, your Honor. I won't have much more.

The Court: It is five o'clock. I suppose we have to quit some time.

Ladies and gentlemen, I suppose we better take an adjournment now. I want to say two things. I think I should say to you that one of counsel, Mr. Hackbert, has to be in the Court of Appeals tomorrow morning; it can't be helped; there is no way that he can avoid being there. There is nothing that he can do about it; I want to say that. But we did think, in order to keep going in this case, that we would have court tomorrow afternoon, beginning at one thirty, and adjourning tomorrow afternoon about five.

And then we will have to adjourn until Monday, and finish the case probably Monday or Tuesday. As you know, we don't very often have breaks like this of time between sessions. I hope that it will not inconvenience you. There is nothing that we can do to avoid the delay,

but at least we will have a session tomorrow after-
278 noon and then finish up early next week, so with that in mind we will take an adjournment until one thirty tomorrow afternoon.

(And thereupon a recess was taken until Wednesday afternoon, September 21, 1955, at one thirty o'clock.)

And on Wednesday afternoon, September 21, 1955, at one thirty o'clock, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: You may proceed.

CLAIRON VERN GIBSON, plaintiff in said cause of action, and a witness in his own behalf, having heretofore been duly sworn, testified as follows:

Cross Examination by Mr. Hackbert (Resumed).

Q. Mr. Gibson, the regular starting time for employees working in the yard either as section laborers or as truck drivers or operators of any other of the equipment
279 of that kind was eight o'clock in the morning, was it not?

A. Yes, sir.

Q. The regular quitting time for all of those men was four thirty in the afternoon?

A. Yes, sir.

Q. And except in case of emergency, those men were through with their work by four thirty in the afternoon?

A. Yes, sir.

Q. When they were through, I take it that these section laborers weren't much different than I was when I worked in the section gang. At four thirty they had their tools all put away and were ready to go back to camp or home; is that right?

A. When they didn't work overtime, that's right.

Q. In other words, they didn't stay out at the place where they were working and then go back to the section shanty and put their stuff away on their own time; they had everything put away by four thirty?

A. The foreman timed it so they would be in their shanty at quitting time.

Q. The foreman timed it so, and the other men who had to turn in reports at building 100 at the end of the day's work, they all timed it so that they had those
280 reports turned in by four thirty?

A. I can't say anything about other than our own activities.

Q. But so far as the section foremen who turned the reports in to you or to Mr. Marjanian, they had those all turned in to one or the other of you by four thirty in the afternoon, didn't they?

A. The reports?

Q. Anything that they had to turn in to you in the afternoon they had turned in by four thirty, didn't they?

A. No, sir.

Q. Well, would they turn them in after four thirty to you?

A. No; as I testified before, they turned in some of those reports the following day.

Q. I am not talking about those turned in the following day. I am talking about those turned in in the afternoon, Mr. Gibson. They were always turned in before four thirty?

A. I don't understand your question, sir.

Q. Well, you have told us about how some of the men who turned in reports of one kind or another would come in at the end of the day's work and turn in those
281 reports either to you or to Mr. Marjanian; is that right?

A. Yes, sir.

Q. And those men, when they came in to turn in those reports, they turned them in by four thirty, by quitting time?

A. As a rule they turned them in by four thirty.

Q. And the only occasion when anybody worked beyond four thirty in the afternoon in building 100 was two nights a month when you and Mr. Marjanian would work there on the payrolls?

A. Yes, sir, when we were authorized to work.

Q. When you and he were working on the payrolls, you stayed right at that job and got it completed just as quickly as you could after four thirty; is that right?

A. You mean when we was working on the payrolls?

Q. Yes.

A. We didn't always complete them that night; we had to take them home after our time limit had expired.

Q. But if you could finish up the job before the time limit expired, you did that, didn't you?

A. If it were possible.

282 Q. And on those occasions when there was so much work to do that you couldn't finish it up in the amount of overtime that you had been allowed, you worked at it steadily from four thirty until the time that you had to quit?

A. Yes, sir.

Q. And there were no other employees there in building 100 on an evening when you were working on the payrolls?

A. Yes, there were, occasionally.

Q. Who would be there, somebody working there, or somebody who just happened to drop by for a minute, or two?

A. It would be someone who dropped by, maybe the night watchman, or foreman for emergency work that might occur would come in for instructions that was left for him or for anything that had been called in. In case he wasn't where his designated spot was to be, why, then they would call up there.

Q. That would be rather an unusual occurrence?

A. It happened, though.

Q. But it was rather unusual?

A. Yes, sir.

283 Q. If there had been a janitor working there in the building after four thirty, while you were working on the payrolls, he would have been in your way, wouldn't he?

A. That never happened.

Q. But if there had been a janitor there, he would have been in your way?

Mr. Waitkus: We object to that.

The Court: Sustained.

By Mr. Hackbert:

Q. Now, as I understand it, by the time you came to work the following morning, you didn't think anything of this incident of bumping your head on the desk?

A. No, sir.

Q. You didn't connect it up with your headaches that you had that day?

A. No, sir.

Q. And I understand from Dr. Lewis that when you went to him in September, of 1952, you didn't tell him about any experience of having bumped your head on the desk; is that right?

A. I don't remember that.

Q. As a matter of fact, at the time you went to Dr. Lewis, you had no recollection or remembrance of
284 having bumped your head that way; is that true?

A. I didn't remember that at all.

Q. Well, when was the first time that it came back to your memory that you had bumped your head on the desk?

A. After I was operated on at Billings Hospital Dr. Hoffman came in and asked me if I hadn't bumped my head sometime within the last year, and I said, no, I couldn't recall of having bumped my head. And then, after I got to thinking and pondering, and after he asked other questions and came back to bumping my head again, it seemed kind of hazy-like that I had bumped my head.

Q. So that it was Dr. Hoffman who put the idea in your mind that you must have bumped your head at some time?

A. Yes, sir.

Q. Now, when it started coming back to you in this hazy fashion, how did you happen to remember that it was at the time you were working on the first payroll in December?

A. Well, after it came back to me, I was in the hospital for a month and eleven days; I had a long time to think.

285 Q. Did it come back to you while you were in Billings Hospital?

A. Yes, sir.

Q. With whom did you talk about this, other than Dr. Hoffman?

A. With my wife.

Q. Did you talk about it with anybody else?

A. I don't remember.

Mr. Waitkus: Are you referring to the time that he was in the hospital?

Mr. Hackbert: At the time he was in the hospital, yes.

By Mr. Hackbert:

Q. Now, after you got out of Billings Hospital, to whom, if anyone, did you talk about bumping your head on the desk?

A. I can't remember whether George Marjanian told me that I had bumped my head on the job at the time he came to see me in the hospital or after I got out of the hospital and he came to see me; I can't remember.

Q. But you did talk to Marjanian about it?

A. He told me I bumped my head.

Q. But you don't remember when it was that he
286 told you about that?

A. I remember, yes, because that was before I could mention it to him; he recalled it to me.

Q. Well, when he recalled it to you, had you already told him that Dr. Hoffman was inquiring about any experience that you had had when you bumped your head?

A. I don't remember that.

Q. He didn't come out and say out of a clear sky something about this desk business, did he?

A. I don't remember just how it came up, sir.

Q. How long after you got out of the hospital was it that you took Mr. Marjanian up to Mr. Waitkus' office to talk to Mr. Waitkus about this?

A. I can't remember whether that was in December or March; I don't remember.

Mr. Hackbert: Mr. Waitkus, is that statement dated?

Mr. Waitkus: December 4, 1952; yes, December 4, 1952.

By Mr. Hackbert:

Q. So that some time either late in November or early in December, before December 4th, you had some conversation with Mr. Marjanian about bumping your head
287 on the desk, and then you took Mr. Marjanian up to Mr. Waitkus' office; is that right?

A. That's right.

Q. And you and Waitkus and Marjanian talked about this thing before you gave this statement to Mr. Cogswell that I read to you yesterday; is that right?

A. All I can remember is that Mr. Marjanian gave his version to Mr. Waitkus about how I had bumped my head.

Q. Now, did either you or Marjanian at that time make out any accident report concerning that incident and turn it in to the Railroad Company?

Mr. Waitkus: If your Honor please, that has nothing to do with the issues here.

The Court: Didn't you go into that yesterday?

Mr. Hackbert: I didn't cover it so far as Marjanian is concerned and I didn't cover it so far as this particular time is concerned. This man did testify that he never turned in any report at any time.

Mr. Waitkus: He said he never turned in any report at any time.

288 Mr. Hackbert: If it is understood that Gibson never turned in any report—

Mr. Waitkus: We admit it.

By Mr. Hackbert:

Q. So far as you know, did Mr. Marjanian at that time or any other time turn in any report concerning this incident?

Mr. Waitkus: We object to that. It is immaterial whether Mr. Marjanian did, or not. There is no issue between Mr. Marjanian and the defendant.

The Court: If you want to show that there wasn't any, that's one thing. I will sustain the objection to this particular question.

Mr. Hackbert: I want to show that there wasn't any.

Mr. Waitkus: We will admit that there wasn't any.

The Court: Filed by anyone?

Mr. Waitkus: That's right.

By Mr. Hackbert:

Q. You never went back to work for the E. J. & E. after you went to Billings Hospital, did you?

289 A. No, sir.

Q. Have you done any work of any kind since then?

A. No, sir.

Q. Have you done any work in and about this health food store?

A. No, sir.

Q. Have you attempted to do any work there?

A. I didn't have any strength to do any work.

Q. Did you attempt to do any work, yes or no?

A. No, sir.

Q. Between the 12th of December, 1951, and the time that you went to Billings Hospital on September 30, 1952, did you work regularly five days a week for the E. J. & E. as a timekeeper, with the possible exception of maybe a day or two here and there?

A. I never lost any time at any time when I started to work for the E. J. & E. until the time I went to the hospital.

Q. You worked steadily right up to the time you went to the hospital?

A. Yes, sir.

Q. Have you attempted to do work any other place since you left Billings Hospital?

A. I have never—I have never done any work of
290 any kind except I went down to the store and limped around and back home; I have never worked.

Q. You have never attempted to seek work any place?

A. No, sir.

Q. This time you fell in the railroad yard, do you recall whether or not there was anyone else around at that time who saw that?

A. I don't remember that. There was no witnesses that I can remember of as to my falling.

Q. At the time you went to Billings Hospital, at the time of your admission, or shortly after that, you were questioned by doctors there as to your past history, were you not?

A. Yes. I went in there in the evening of September 30th, and the operation wasn't until the 6th of October.

Q. And in that intervening period of time, one or more doctors talked to you and asked you questions about your past experiences, the onset of your trouble, and that sort of thing?

A. They had a staff of men that asked me all kinds of questions.

Q. You answered those questions truthfully to the
291 best of your knowledge and recollection, as it was at that time?

A. My remembrance I think wasn't as good as it should be, and all I know is I answered any question the best I knew how to answer it.

Q. You answered truthfully as you then recollected what the situation was about which you were being asked?

A. Yes, sir.

Mr. Hackbert: I think that is all.

Redirect Examination by Mr. Waitkus.

Q. Vern, when you testified on cross-examination that there were two timekeepers at Kirk Yard in December, 1951, were there any other timekeepers that worked in and around Kirk Yard?

A. Yes, sir. I testified there were two timekeepers in building 100.

Q. How many timekeepers altogether worked out of Kirk Yard?

A. Well, there were four timekeepers in Kirk Yard.

Q. In addition to the two?

A. No; two in building 100 and two in rolling cars.

292 The Court: I believe that is what he said yesterday.

Mr. Waitkus: Mr. Hackbert brought out the fact once that there were just two timekeepers. I wanted to show that there were more timekeepers that did work out there and in the accounting department.

By Mr. Waitkus:

Q. Mr. Gibson, did you ever get any orders from Joliet, as to certain instructions about your work?

A. Yes, sir. I received a copy of them.

Q. Were some of those orders in connection with the hiring of these gandies you spoke about?

A. Yes, sir.

(Instruments were marked Plaintiff's Exhibits 9 and 10, for identification.)

Q. Were some of the orders in reference to the forms you had to fill out?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibits 9 and 10, and ask you whether these are such orders?

A. Yes, sir.

Mr. Waitkus: Is there any objection to these? We
293 just found these last night, your Honor. I would like to offer them in evidence.

The Court: It may take time to read them. I won't rule until a later time.

I suggest that we go ahead.

Mr. Waitkus: Perhaps we can stipulate it.

(An instrument was marked Plaintiff's Exhibit 11, for identification.)

Mr. Waitkus: I will stipulate that this is the section foreman's daily report.

Mr. Hackbert: The form on which the section foremen make their daily report.

Mr. Waitkus: To the timekeeper.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 11 was admitted in evidence.)

The Court: Do you want to exhibit it? It might take a little time.

Mr. Waitkus: I wanted to read it and pass it to the jury. I think I will pass it to the jury.

The Court: Why don't you just hold it up and say what it says?

294 Mr. Waitkus: I will do that.

It says Accounting Number, Hours, Amount, Material Used, New, Usable or Scrap, Where Used. And then here, the same thing at the bottom; they set out the same columns, Amount, Material Received, New, Used or Scrap, From.

And down here we have the column Hours, for number of hours, and Distribution, I presume referring to work that was done. We have Total Time, Number of Men, Section No., Foreman, and the Date.

Do you have any objection to 9 and 10?

The Court: Unless you want to question the witness about them. I will wait until after a recess.

Mr. Waitkus: I don't think I will, your Honor.

By Mr. Waitkus:

Q. Mr. Gibson, you stated that at the time you fell previously in March, of '51, you thought, you made a report to the hospital?

A. Yes, I did make a report.

295 Mr. Waitkus: Do you have a copy of that report with you, Mr. Hackbert?

Mr. Hackbert: I don't think I do.

The Court: Can you wait on that?

Mr. Waitkus: I can wait on that.

Mr. Hackbert: I will check. It is available.

By Mr. Waitkus:

Q. Do you happen to have any of those distribution sheets, Mr. Gibson, that we talked about?

A. No. The monthly sheets were about that wide and about that high (indicating).

Mr. Hackbert: Be about two feet wide.

The Court: The question is whether he had any. He said no.

Mr. Waitkus: Will you get some of those?

Mr. Hackbert: Yes.

Mr. Waitkus: That is all.

Recross Examination by Mr. Hackbert.

Q. Was there any particular time of the month when the distribution sheet was due?

A. Yes, it always had to be in by the first of the following month.

296 The Court: Anything further? If you want to question him about it later on, I will permit his return.

By Mr. Hackbert:

Q. I wanted to ask you, Plaintiff's Exhibit 9 is dated March 29, 1951, and Plaintiff's Exhibit 10 is dated April 17, 1951. So far as you now recollect, were those orders in effect in December, 1951?

A. Those orders went into effect after the investigation, after I yelled about having too much work to do, too many reports to make out on the hiring of men.

The Court: The question is, were these orders, if they are orders, in effect during December.

The Witness: As far as I can recall, they were in effect right straight through.

Mr. Hackbert: That is all.

(And thereupon the witness was excused.)

297 DR. F. D. HACKETT, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. What is your name?

A. I am Dr. F. D. Hackett.

Q. What section of the medical profession, may I ask?

A. I am a Doctor of Optometry.

Q. Where is your office located, Doctor?

A. 701 Washington Street, Gary, Indiana.

Q. How long have you been there, Doctor?

A. Since March, of 1950.

Q. Do you know the plaintiff in this case, Clairon Vern Gibson?

A. Yes, sir.

Q. How long have you known him, Doctor?

A. Since about May, of 1950.

Q. And did you have occasion to see him from May, of 1950, on until say through December, of 1951?

A. Yes, sir; and occasionally beyond.

Q. Do you know where the health food store that
298 Mr. Gibson operated was located?

A. Yes, sir; it was at 703 Washington Street. It is located in the same building, and actually in the same office space that our office is located. In other words, we have a building about 25 feet wide and about 60 feet long. We found when we rented it that it was more than adequate for our needs, so we split it in half.

Q. And the other part is rented by this health food store?

A. That's right. We subleased the back half of our quarters to the Gary Health Food Center.

Q. How often would you see Mr. Gibson during the period of March, 1950, through December, of 1951?

A. Practically every day, if not every day—no, there were days that I didn't see him, but, for all practical purposes, every day.

Q. Can you tell us whether you observed the way Mr. Gibson walked during that period?

A. Perfectly hale and hearty; everything was fine.

Q. Was there anything wrong, as far as any limp, that you could see?

A. He couldn't have done the things that he did during that period and limped.

299 Q. Well, did he do any work around there during that time?

A. Yes, lots of it. In other words, he was more or less in the same position that we were in that period of time, not an over-excess of money, so when we had to do things around the office both he and we did it ourselves.

Q. What sort of work did he do?

A. Oh, such as constructing his shelves back there, and partitions, and things like that.

Q. Now, after December, of 1951, do you know whether or not there was any change in his gait?

A. I didn't see him too often after that. I other words, it was along about then that he went with the E. J. & E., and then I didn't see him near as frequently as I did before. I do know that on infrequent visits to the place he was developing a limp; I noticed that. I also noticed that one of his hands wasn't working too well after that time.

Now, when, I can't say, because I saw him infrequently after that.

Q. Well, that was during some time in 1952?

A. Yes, I would say it was in 1952 sometime.

Q. Did you ever have occasion to check his eyes, 300 Doctor?

A. Yes, sir, several times.

Q. Did you ever check his eyes in 1951?

A. I think it was toward the close of 1950 that I checked them, and he took fairly strong astigmatic correction, but the vision was good when we got done, in other words, he saw very well when we finished.

Q. Did you have any occasion to check his eyes any time in 1952?

A. Yes; toward the end of 1952, it was around in October, I imagine it was, some time in that period, we checked them again, and found exactly the same correction on his eyes. The only difference being in one of the eyes the vision had started to dim. In other words, we use as a criteria 20-20 as being what a normal person can see compared to what the patient can see, and in the latter part of 1950 he did get 20-20 in both eyes. In 1952 the vision had started to slip in one of the eyes.

Mr. Hackbert: Did you say in one of the eyes?

The Witness: Yes. The other eye was still per- 301 fectly 20-20, but the one eye started to slip.

Mr. Waitkus: That is all.

Cross-Examination by Mr. Waitkus.

Q. How much had it started to slip?

A. By our calculations, it slipped from 20-20 to about 20-40 during that period. Now, that means—in other words, that is a ratio; it is not a fraction; it means that he saw at 20 feet what the normal person could go back to 40 feet and see.

Q. In other words, you tested him by this chart on which there are lines of letters of different size?

A. Exactly.

Q. And when you say a man's vision is 20-20, that means that standing 20 feet away from the chart—that is the distance they stand?

A. Yes, that is the regulation distance.

Q. Standing 20 feet away, he can read the line that it is normal for persons to read at 20 feet?

A. Yes. It actually contains an angle of one degree. In other words, that is the way it is rated.

302 Q. If he does not read that line perfectly, misses one or two letters in that line, then you try him on the next larger line?

A. No, sir, you rate him 20-20. In that case, there are six letters on the 20-20 line, if he misses two, you rate him 20-20 minus 2; in other words, minus the number of letters that he misses. You always start from the larger and work down, not from the smaller and work back up.

Q. When the man is able to read three letters on the line, how do you rate him then?

A. Then you usually drop to the higher number, and say 25 plus 3.

Q. What is the next reading after 20-20?

A. In which direction?

Q. Well, I don't know whether you call it up or down.

A. If you mean the next larger letter, it would be 20-25. In other words, what the normal person can see at 20 feet,—what this person can see at 20 feet the normal person can see at 25 feet. In other words, it is the normal going back a few feet at each step or at each gradation of the letter. Then it goes up to 20-30. He sees

303 at 20 feet what the normal person can go back to 30 feet and see. Then it goes to 20-40. He can see at 20 feet what the normal person can see at twice the distance, which is 40 feet.

Q. Were those two occasions, sometime in 1950 and the latter part of 1952, the only two occasions on which you tested his vision?

A. No, sir; I think we have tested it in 1954, also.

Q. Have you prescribed glasses for him?

A. We have not changed his lenses since that time.

Q. Since when?

A. Since 1950. In other words, it apparently has not changed in refraction at all; just a dimness of vision has occurred. In other words, the change in refraction is caused by a variance in the curvature of the front part of the eye, or a variance in curvature of the lens inside of the eye. It appears that those surfaces have not changed since that time. It is just the vision itself that has dimmed.

Q. Now, during the time that you were seeing Mr. Gibson almost daily,—that was prior to the time he went to work for the E. J. & E.?

A. Yes, sir.

304 Q. He was then busy and active around the store?

A. Oh, yes, very active, building shelves. Heck, when I wasn't busy, I was in there helping him build the shelves.

Q. And after he went to work for the E. J. & E., you didn't see him except infrequently?

A. Right.

Q. He wasn't around the health food store?

A. No.

Q. After he worked for the E. J. & E.?

A. He would come down, pick up his wife, say, on Monday evenings and Thursday evenings. I may, or may not, depending upon whether or not at the time he came in I was busy, I would maybe see him then, maybe once a month, and for very short periods of time after that.

Q. So that consequently you were not as familiar with his appearance and his gait after he started working for the E. J. & E. as you had been before that?

A. Definitely not.

Q. And, as you recall it, it was sometime early in 1952 that you first became aware of any change in his gait?

305 A. Yes, sir.

Q. What was it that you noticed first?

A. This may sound strange, but what I noticed first was that he wasn't writing very well. He would scratch a note to me, maybe, or, I don't know how it came about, but actually the first thing I noticed was that his writing wasn't so good.

Q. When would you say that that was?

A. That was in '52.

Q. Are you able to fix what time in '52?

A. No, sir.

Mr. Hackbert: That is all.

(And thereupon the witness was excused.)

RAYMOND WELLER, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. Will you state your name to the Court and jury, please?

A. Raymond Weller.

Q. Where do you live?

A. 112 West 7th, Gary, Indiana.

306 Q. How long have you lived in Gary?

A. Ten years.

Q. What profession are you in?

A. I am an optician.

Q. Do you have your own business?

A. Yes, I do.

Q. And where are you located?

A. Also, 112 West 7th.

Q. Now, did you know Mr. Gibson at the time that he operated this health food store?

A. Yes, sir. The first time Mr. Gibson came to town, I met him.

Q. That was back in 1950?

A. That is correct.

Q. How often would you see him during 1950?

A. Every day.

Q. Was there anything wrong with his gait or walk that you observed?

A. Nothing.

Mr. Hackbert: I think I will object to that question, as leading. He could be more properly asked what he saw.

The Court: Well, I will overrule the objection.

307 A. (Continuing.) It was normal.

By Mr. Waitkus:

Q. Do you recall approximately when Mr. Gibson went to work for the E. J. & E.?

A. No, I don't; the approximate time, I don't.

Q. Well, can you say whether there is anything that brings to your mind as to his gait or walk prior to December, of '51?

Mr. Hackbert: I think, if your Honor please, unless we have some way of knowing what significance December,

1951, has to this witness, we will object, if he is not able to fix the time of the relationship—

Mr. Waitkus: We are trying to show that there was a specific occasion prior to December, in 1951, that he specifically remembers.

The Court: I will overrule the objection.

The Witness: What was the question?

(Question read.)

A. I didn't notice anything different about Mr. Gibson until 1952. In fact, I was at Mr. Gibson's home for a
308 New Year's eve party; there wasn't anything wrong with him then; and that was the first part of 1952.

Q. From the time you first met him in Gary to New Year's eve,—

A. There was still nothing at that time; I noticed nothing different then. I had seen him shortly after that, and I would say at that time, some time in 1952, was when we noticed—the first thing I ever noticed was a limp. As far as his writing, I didn't notice that. It was the limp that I noticed.

Q. That limp that you first noticed, when would that be, could you say whether it was the spring, summer, or fall of '52?

A. Oh, gosh, I wouldn't have any idea; my memory isn't very good, as far as that goes, but it was somewhere in the middle part of 1952, I would say.

Mr. Waitkus: That is all.

Cross-Examination by Mr. Hackbert.

Q. There wasn't anything about Mr. Gibson's condition that particularly impressed itself upon your mind with
309 relation to any point in time other than your recollection of this New Year's eve party; is that right?

A. No; I spent a great deal of time with him; I would say I stopped out at the house many times and said hello, and, like Hallowe'en time, I would take stuff out for the kids, but I never noticed anything. I will say that the last time I actually remember was New Year's eve, and I hadn't noticed anything at that time.

Q. And sometime after that you say you now recall you noticed him limping?

A. That's right; I did notice it; I would say it was quite a while after that before I had noticed it.

Q. My question is, there isn't anything in your recol-

lection that fixes the time as of which you did first notice it then quite a while after New Year's eve?

A. I couldn't put a definite day or month, no; I couldn't definitely say what month it was that I noticed it, but it was a gradual thing.

Q. Had you spent other New Year's eves with Mr. and Mrs. Gibson other than the one in 1952?

A. That I would say would be the first New Year's
310 eve, yes; other than that, I spent other times out there.

Q. Is your office close to his food store?

A. Well, today, it is right next door.

Q. Was that true back in 1950, '51 and '52?

A. That is correct.

Q. In other words, you are just around the corner?

A. No, at that time, in 1951, I worked for Dr. Hackett and Dr. Smith.

Q. So that at that time you were in the office space that Dr. Hackett just told us about?

A. That's right.

Q. I take it that after Mr. Gibson went to work for the E. J. & E., just as in Dr. Hackett's case, you saw him much less frequently then?

A. That's right, but more often than Dr. Hackett had seen him.

Q. How often would you say, during the course of a month or two, you would have occasion to see Mr. Gibson after he went to work for the E. J. & E.?

A. I would say an average of three times a week.

Q. And that would be where, at his home?

A. No; it would be downtown, coming down to pick her up, or stopping at the house. Vern and I were
311 more or less kind of close; we were coffee buddies, you know, when he worked there.

Q. On these occasions when you would see him, when he came to pick up his wife, come by the store, I take it that would be for just a few minutes time, rather than the rather intimate association that you had when he was working there?

A. At that time it was just more or less a few minutes; we would go down for a quick coffee, come back, and he would take her home.

Mr. Hackbert: That is all.

(And thereupon the witness was excused.)

Mr. Waitkus: Your Honor, at this time we would like to have the deposition of Dr. Hanna published.

The Court: I don't think you need to have it published.

Mr. Waitkus: We want to have it read at this time. It will be rather lengthy. I wonder if the Court wants to start now.

The Court: Maybe we better have a five-minute recess.

(A short recess was taken.)

312 The Court: I might say to the jury that Mr. Waitkus intends to read a deposition. A deposition as you perhaps already know from previous experience as jurors is a record of the testimony of a witness taken at a previous occasion before the trial of the case. Many times witnesses cannot be available at the trial, and upon notice to the other side, at which time all of the parties can be present, the witness appears before a notary public and he is examined and the answers that he gives to these questions are taken down by a reporter and later written up and sent to the court, and then the deposition may be read as the testimony of that witness. He is sworn as a witness, just as if he were present here.

As I understand it, that is the next matter that you will hear, the deposition of one witness who cannot be here.

You may proceed.

Mr. Waitkus: This is the deposition of Dr. Duke E. Hanna. We intend to use Mr. Anhold, an attorney
313 from Gary, to read the answers to the questions heretofore asked Dr. Hanna so that it will be a little more effective.

Mr. Anhold, will you take the stand, please.

(And thereupon the following record was made on the deposition of Dr. Duke E. Hanna, Mr. Waitkus reading the questions and Mr. Anhold the answers:)

"DR. DUKE E. HANNA, a witness produced on behalf of the plaintiff, having been first duly sworn upon his oath by the notary, was examined and testified as follows:

"*Direct Examination by Mr. Waitkus.*

"Q. Doctor, will you please state your name."

"A. Duke E. Hanna."

"Q. Where do you live, sir?"

"A. My home address is 7810 East St. Joseph, Indianapolis, Indiana."

"Q. What is your profession?"
"A. Physician and surgeon."
"Q. And where are you practicing at this time?"
"A. Indianapolis, Indiana."
"Q. Are you duly licensed to practice as a physi-
314 cian and surgeon in the State of Indiana?"
"A. Yes, I am."
"Q. Were you so licensed in October and November, 1952?"
"A. Yes."
"Q. Were you so licensed to practice in the State of Illinois at that time?"
"A. No."
"Q. Were you duly licensed to practice in the State of Indiana in October and November, 1952?"
"A. Yes."
"Q. And of what medical school are you a graduate?"
"A. Indiana University."
"Q. When did you graduate from medical school?"
"A. April, 1946—April 23rd."
"Q. Have you had any other study or training since then?"
"A. Have I had any other study or training since that time?"
"Q. Yes."
"A. Yes."
"Q. Can you tell us whether that was in any special field?"
"A. Yes, that was in the field of neuro-surgery—
315 general surgery and neuro-surgery."
"Q. Can you explain, Doctor, just what that includes?"
"A. Well, let's see. I have had a year in the field of general surgery, which includes operations and training in the field of general surgery for a period of one year, and three years in specializing in the field of neuro-surgery, which consists of surgical treatment of the diseases of the nervous system, which includes the brain and its coverings, the spinal cord, the nerve roots, and surgery of the sympathetic nervous system."
"Q. After you got out of school and graduated in 1946, did you go into the immediate practice of medicine?"
"A. No, I did not. I was not in the practice of medicine in the sense that I went in the Navy after I took my

interneship. The interneship was from May, 1946, until July, 1947."

"Q. Then you went into the Navy?"

"A. That is right."

"Q. Were you a doctor in the Navy?"

"A. Yes, I was."

"Q. And, after you went out of the service, did
316 you again—did you go into private practice?"

"A. Yes, I did."

"Q. Where was that, Doctor?"

"A. Red Key, Indiana, and also some time in Indianapolis—a matter of a month in Indianapolis. Then, after that, I was in general practice at Red Key, Indiana, until the 30th of June, 1951."

"Q. Where did you go to from there, Doctor?"

"A. From the first of July, 1952, until the—"

Mr. Hackbert: I interrupted to say, "Do you mean '52 or '51?"

"A. 1951, until the 30th of June, 1952, the Methodist Hospital in Indianapolis in general surgery."

"Q. Where did you go from there, Doctor?"

"A. I went to the University of Chicago."

"Q. In what capacity were you in the University of Chicago?"

"A. At first I was—my first year I was Assistant Resident, second year I was Resident, and third year I was Resident Instructor in neuro-surgery."

"Q. You were not in the general practice while you were in Chicago?"

"A. No."

"Q. The work that you performed was in one of
317 the University of Chicago clinics?"

"A. It was in the whole of the University of Chicago clinics—all of the hospitals."

"Q. In other words, they have different clinics in the hospital?"

"A. They have different hospitals. They are all connected together."

"Q. In the same clinic?"

"A. Yes."

"Q. Do I understand you were in the department of neuro-surgery?"

"A. That is right."

"Q. You say you tanght while you were there in the University?"

"A. Yes."
"Q. And you taught in the field of —"
"A. Neuro-surgery."
"Q. —neuro-surgery. Were these medical students, or whom did you teach?"
"A. Medical students, internes, and residents."
"Q. With what hospitals or institutions are you now connected, Doctor?"
"A. Indianapolis General Hospital, Indianapolis Methodist Hospital, and St. Francis Hospital."
318 "Q. And you are now specializing as a neuro-surgeon, is that right?"
"A. That is correct."
"Q. Referring back to the time that you were in the University of Chicago clinics or hospitals, Doctor, back to September 30th, 1952, do you recall a patient by the name of Clairon Gibson?"
"A. Yes."
"Q. Doctor, when a patient comes into the clinic, or one of the hospitals, can you tell us what the usual practice is from the standpoint of taking their history?"
"A. In a general way, the externe, or medical student, is assigned to the case. He is usually on a particular service at the time. He then takes a detailed history and physical."
"Q. From the patient?"
"A. From the patient, usually, unless the patient is uncooperative or is unable to give a record."
"Q. Then they might get the information from a close relative?"
"A. Or somebody who knows anything about the case. Sometimes no history is ever available."
"Q. And this history that is taken assists the doc-
319 tor in making the diagnosis, is that true?"
"A. Assists the doctor?"
"Q. Yes."
"A. Oh, yes."
"Q. In other words, you have to have the history in order to decide what to do and the type of tests to give the patient, is that true?"
"A. That is right."
"Q. Now, in the case of Clairon Vern Gibson, the history was taken of him, was it not?"
"A. We haven't really finished what we were saying on the first part in that the externe—the medical student—

takes the history and physical, and the interne repeats in a brief way, going over the patient completely in regard to the history and physical, and usually there is a little more or less testing, and then that is well checked and corrected, if necessary, by the Resident and the attending staff."

"Q. And that is the usual practice and procedure of the hospital and clinic?"

"A. That is right."

"Q. In other words, any work that is done or performed or tests given by any of the doctors or the laboratories,
320 that is also contained in the records and files pertaining to that patient?"

"A. It should be."

"Q. And that would include the different tests that were taken or prescribed in treatment for the patient. That would all show in the—"

"A. Yes."

"Q. And, when the patient is discharged, it would show what the final diagnosis would be as to the individual, is that correct?"

"A. Yes."

"Q. And, from your knowledge, did you assist in taking any of the examinations and tests regarding Clairon Gibson?"

"A. Yes."

"Q. From your recollection, Doctor, can you tell us the condition of Mr. Gibson when you saw him in the hospital?"

Mr. Hackbert: I interrupted to say, "Are you referring, now, to the first time he saw him?"

"Mr. Waitkus: Yes, the first time."

"A. Well, he had a —"

Mr. Hackbert: I said, "By the way, Doctor, when was that, if you remember?"

321 "A. When was this?"

Mr. Hackbert: I said, "When you first saw him."

"A. I would say around the 5th of October, I think."

"Q. Of 1952?"

"A. Yes; maybe a little bit before that time. I am not sure."

"Q. Can you tell us what you observed at that time, Doctor?"

"A. Well, he had a paralysis of his right side of his body. It wasn't complete; partial, involving primarily the leg and arm."

"Q. By saying 'partial paralysis' did he have any trouble with walking?"

"A. Yes."

"Q. And you say that was the right side?"

"A. Right side."

"Q. And how was his arm involved?"

"A. He had difficulty with the arm for ordinary movement you would use an arm for."

"Q. Was there any preliminary diagnosis made at that time, Doctor?"

322 Mr. Hackbert: I interrupted; "By Dr. Hanna, you mean?"

"Q. Let me ask you, was there any preliminary diagnosis made by you at that time, Doctor?"

"A. These cases are usually gone over by the—both the Residents, of which there are two of us. One of us was Dr. Ralston, who actually saw the man before I did, and Dr. Hoffman, who was the Assistant Professor at that time."

"Q. And you fellows discussed the diagnosis?"

"A. Yes."

"Q. Can you tell us what that preliminary diagnosis was?"

"A. Well, the preliminary diagnosis is a space-consuming lesion involving the left cerebral hemisphere, most likely a brain tumor."

"Q. When you give a preliminary diagnosis, is that given before any tests are given or made of the party?"

"A. Before any of the X-ray diagnostic procedures are performed, there are tests. In other words, a neurological examination I would presume is a test."

"Q. When you say that preliminary diagnosis showed that there was a—how did you say that—space—"

323 "A. Consuming."

"Q. —"space-consuming—"

"A. Lesion."

"Q. —in the brain, can you explain that a little bit to us, Doctor, as to what you mean by that?"

"A. Something present in or within the brain which is taking up space normally occupied by the brain and producing pressure or destruction of the brain."

"Q. In other words, a preliminary diagnosis at that time was that there was some foreign matter in the brain that should not have been there and causing pressure on the brain?"

"A. Something that should not have been there."
"Q. Something that should not have been there?"
"A. Yes. Whether it was a foreign matter or not we couldn't tell offhand."
"Q. Now, after the preliminary diagnosis was made, can you tell us the type of tests, if any, that were given and were made of the patient, Clairon Gibson?"
"A. A pneumo-encephalogram."
"Q. A pneumo-encephalogram was taken. Can you explain what that is, Doctor?"
324 "A. That is a test where the spinal fluid is removed and replaced with oxygen or air. In this case it was oxygen, and then X-rays are taken in certain positions in order to demonstrate the spaces overlying the brain and the spaces inside the brain."
"Q. And do you know what the pneumo-encephalogram showed here, if anything?"
Mr. Hackbert: At the time of taking the deposition, I made an objection, which I will, however, withdraw.
The Court: Go ahead and answer.
Mr. Waitkus: I asked another question.
"Q. Did you see the X-rays, Doctor?"
"A. Yes."
"Q. After the pneumo-encephalograms were taken?"
"A. Yes."
"Q. Were you the doctor who gave the pneumo-encephalogram?"
"A. Yes."
"Q. You did that and you saw the X-rays after they were developed?"
"A. Yes."
"Q. And what did they show?"
Mr. Hackbert: Again I made an objection, which I
325 will withdraw.
"Q. You may answer that, Doctor."
"A. They showed a large collection of air with a fluid level overlying the left side of the brain with a shift of the ventricular system spaces to the right side."
"Q. Now, the pneumo-encephalogram—strike that. Did the test you gave him indicate that there was anything in the skull or brain that was causing pressure?"
Mr. Hackbert: I made an objection to that question, and the question was withdrawn, so there is no point to it.
"Q. Can you tell us what your test at that time showed, if anything, Doctor?"

"A. I just described what the test showed to the best of my recollection."

"Q. Will you describe that again, Doctor?"

"A. Describe it again?"

"Q. Yes."

"A. There was a large collection of air with a fluid level overlying the left side of the brain with a shift of the ventricular system to the right."

"Q. Well, can you explain that in a little plainer
326 English, shall I say the layman's language, so we might understand what that—"

"A. This demonstrated the presence of an abnormal fluid material not usually seen, which was in communication at the time of the examination with the subarachnoid space overlying the left side of the brain."

"Q. In other words, your test showed there was something there that was abnormal?"

"A. Yes."

"Q. And did you make a diagnosis of what that was?"

"A. Yes."

"Q. What was that diagnosis?"

"A. A subdural hydroma or hematoma."

"Q. Will you describe what you mean by a subdural hematoma and also what you mean by a subdural hydroma?"

"A. A subdural hydroma is a collection of fluid in a space called a subdural space which, in the normal state is a potential space. This space is located between the dura covering the brain and the anachroid"—

Mr. Waitkus: That word should be arachnoid.

327 "A. —arachnoid covering the brain. The dura mater is the most exterior. The arachnoid is the most internal mater. Actually, there are two layers of arachnoid, as you may know. The subdural hematoma is a collection of blood in the same space—abnormal collection of blood."

"Q. Now, this abnormal collection of blood or liquid differentiates whether it is a hematoma or a hydroma, is that right, Doctor?"

"A. Yes."

"Q. As I understand it then, the subdural hematoma would be a blood clot or collection of blood under the dura between the dura mater and the arachnoid, which is the covering next—"

"A. Closer."

"Q. —to the brain? Is that right?"
"A. Yes."
"Q. And a subdural hydroma is a collection—abnormal collection of fluid that might be a growth or similar to a growth or cyst or a sac that would be pressing on the brain?"
"A. It could be."
"Q. It could be?"
"A. Yes."
328 "Q. Depending on the size, is that what you mean?"
"A. Depending on whether it has a membrane around it—as to whether it becomes cystotic or not."
"Q. Now, a subdural hydroma can vary in size, can it not, Doctor?"
"A. Yes."
"Q. Is there more than one type of a hydroma?"
"A. Well, a hydroma is—do you want me to explain this?"
Mr. Hackbert: I said, "Yes."
"The Witness: A hydroma can usually develop into one where the arachnoid is torn, allowing the escape of fluid into the subdural spaces. The tearing of the arachnoid acts like a ball valve, and the abnormal fluid becomes more concentrated—the abnormal fluid collection becomes more concentrated and tends to draw fluid in through by osmatic pressure."
Mr. Hackbert: That word is "osmotic" pressure, "by osmotic pressure," not through.
Mr. Waitkus: It is "by osmotic pressure".
"The Witness: (Continuing.) It can also occur as a result of bleeding in which the blood becomes liquefied. The cells are then disintegrated and absorbed and
329 taken up by the body, leaving a collection of yellowish or greenish yellow fluid."
"Q. And can these types of hydromas vary in size from small to large?"
"A. Yes. They can occur on both sides of the brain at the same time."
"Q. Can a hydroma become what they call a chronic thing?"
"A. Yes."
"Q. By saying—calling something a chronic hydroma, how do you explain that?"

"A. A chronic hydroma would be one that would have been present over a period of time. Usually, I would fairly give it as possibly six weeks."

"Q. Is there any difference in the change of chronic hydroma? I mean, can it vary? How would it act?"

The Court: Is this portion of the deposition cumulative, as to what the other doctor stated?

Mr. Hackbert: No, I think I would say not, if your Honor please.

Mr. Waitkus: In some instances. It is different, though.

330 The Court: I was wondering if it was cumulative, if it was just repetition.

Mr. Waitkus: No. This little part may be, but it goes on.

The Court: All right.

Mr. Waitkus: I will ask the question over:

"Q. Is there any difference in the change of chronic hydroma? I mean, can it vary? How would it act?"

"A. You mean the fluid collection itself?"

"Q. That is right."

"A. Well, it usually enlarges."

Mr. Hackbert: I interrupted, "You say they usually enlarge?"

"A. Yes, by virtue of the fact of the previous testimony where I said osmotic pressure often tends to draw fluid into it and, in the case when a membrane begins to form, new fields may rupture into the sac, producing more—"

"Q. More liquid?"

"A. More liquid."

"Q. During the time as it grows larger, would it tend to affect the brain in any way?"

331 "A. Yes."

"Q. In what way would it affect it, Doctor?"

"A. Causes pressure on the brain."

"Q. And would that—what would that pressure do, or would that pressure be shown in any way in any other part of the body?"

"A. Only in that paralysis or disturbance of that particular brain function may be derived. I don't know if you want me to go into all that, or not."

"Q. Just explain it a little more, if you can."

"A. If a collection of fluid is over the hemisphere,

usually the patient will have some behavior disturbance or personality change, may develop inability to speak. I have already mentioned paralysis may occur. Paralysis may occur on the same side of the body as well as the opposite side."

"Q. Now, with chronic subdural hydroma, Doctor, might there be times when the patient would not be affected as much as he would at other times?"

"A. Yes. You mean the clinical course—matter of going up and down?"

"Q. That is right."

"A. That is true. It can but it is usually progressive."

332 "Q. Usually gets a little worse, you mean?"

"A. A little worse."

"Q. Would that indicate that the hydroma was either getting larger or causing more pressure, if I understand you?"

"A. Well, usually indicates that the brain is not—has not accommodated itself to that pressure. There can be a large pressure on the brain occur over a long period of time which may cause very little symptoms and cause marked displacement and destruction of the brain."

"Q. In other words, a hydroma of that sort would be an abnormal thing and would cause damage to the brain?"

"A. In my opinion, yes."

"Q. As a matter of fact, brain cells, if they are once destroyed, can they be rejuvenated?"

"A. If they are destroyed, they do not become rejuvenated. Although there are many more brain cells than one really needs under normal circumstances, some cells may be physiologically unable to perform their duties even though they are not dead."

"Q. And would that show up in any way in any of the other motor functions of the body if, say, part 333 of the motor centers were destroyed or injured?"

"A. Yes, in that, in a person who has paralysis resulting from such a thing, once more nearly normal situations are established recovery function will often occur."

"Q. Now, I believe you said, Doctor, that, after the tests that you gave, you diagnosed this patient, Clairon Gibson, as having, as I understand it, a chronic subdural hydroma?"

"A. Yes."

"Q. And did you and the other doctors discuss this patient and the diagnosis?"

"A. Yes."

"Q. And can you tell us what was to be done for this patient?"

"A. Yes."

"Q. If anything?"

"A. Removal of the fluid was contemplated by making a small window in the skull."

"Q. Can you explain that a little more fully to us, Doctor—how it was done?"

"A. An incision is made. In this case, of course, we knw that he had fluid in there. It wasn't a solid mass—large tumor—and, therefore, we can do that usually
334 through a much smaller opening. What we do is make an incision which extends usually—we are talking about this case?"

"Q. In this case here."

"A. He had an incision which was brought probably about two centimeters in front of the ear and extended for a distance of eight or nine centimeters straight vertically, and then a burr hole was placed, and then this area was opened largely by means of bone-cutting instruments, and then the dura over the brain was incised, and we came upon a rather thick membrane, which attached there. The outer membrane then seemed to have fluid in it, which was removed. The outer membrane itself was then dissected away from the dura and the inner membrane, which was tightly adherent to the underlying arachnoid, was partially removed, and then a drain was placed in this area and brought out through the scalp."

"Q. Can you tell us, Doctor, how large this mass was that was removed?"

"A. Well, that would be hard to say, I think. I can't really say."

"Q. Was there much liquid there?"

"A. That, again, is also difficult to say. At least,
335 it had at the time of the operation. That is very difficult to assess because of the pulsations, and the fluid leaks out, and you can't really collect all the fluid. Like you could in a spasm, for instance."

"Q. But it was cleared out?"

"A. It was cleaned out, yes, and the brain had been depressed away from the skull for a distance of four

centimeters. That is about an inch and three-quarters, I would think."

"Q. Now, in your opinion, Doctor, what causes this type of a hydroma to appear that way in the brain?"

"A. The most usual cause is injury to the head."

"Q. And, from the history in this case, Doctor, would you say that an injury had caused this—could cause it?"

"A. An injury could cause this."

"Q. And from the history you had had of this case, would you say an injury did cause this?"

Mr. Hackbert: At that point, I objected, on the ground that the injury he has is not specified in the question, at least, as it is written up here. I think my objection
was that the history that the doctor had was not speci-
336 fied in the question.

The Court: Is there an answer?

Mr. Hackbert: I am sorry; there wasn't any answer to it.

Mr. Waitkus: I said, "We will get to that a little later."

"Q. You testified, in this operation, Doctor—strike that. You were one of the doctors that were present at the time of this operation?"

"A. Yes."

"Q. Who else was present?"

"A. Well, there was Dr. Hoffman was the surgeon, Dr. Ralston. There was a first assistant. I was the second assistant. Dr. Rasmussen was present."

Mr. Hackbert: I asked, "What was his function?"

"A. He was Professor of Neuro-Surgery."

Mr. Hackbert: "So far as the operation was concerned, he was what would be called an observer?"

"A. Yes. He is the one that is responsible for everything that goes on. The nurses. I don't know who the nurses were."

"Q. I was primarily interested in the doctors."

337 "A. Anesthetists were there."

"Q. And, after that hydroma was removed, Doctor, was it sent to the laboratory?"

"A. Yes. The hydroma—the membranes were sent to the laboratory for histological sectioning."

"Q. Now, from the appearance of the hydroma, Doctor, could you tell the approximate age of it?"

"A. Well, I don't think you could tell the approximate age. You could see that the membrane had been there for probably a period of at least six weeks to two months."

"Q. In other words, it would be at least that long?"

"A. Long enough for fibroblast to infiltrate and form collagenous tissue."

"Q. Now, Doctor, do I understand that it was at least that old and could you say how much older it was than that?"

"A. No. No one, I think, could say. You could judge by individual history sometimes how old it might be but, just looking at the section, I don't believe that you could exactly say how old it was."

"Q. From the individual history you had here and the hydroma that was removed, do you have an opin-
338 ion, based on reasonable certainty, as to the age of that hydroma?"

Mr. Hackbert: At that point, I objected. There wasn't any answer.

"Q. Well, by the 'individual history,' Doctor, I mean the history regarding Clairon Gibson here—a possible injury that he may have received?"

"A. Well, in the history it states that he had been having difficulty with weakness in his right leg, which began approximately one year before admission to the hospital."

"Q. And, based on that individual history that you had, Doctor, would you say that that hydroma that was removed was the cause of the—strike that. Would you say that, based on the individual history, would you say that the hydroma that was removed was the—strike that. The fact that the patient stated that he had weakness in his right leg, which began about a year prior to removal of this hydroma, would you say, Doctor, that hydroma was the competent producing cause of that?"

"A. Of the weakness?"

"Q. Yes."

"A. Yes."

339 "Q. Would you say that that hydroma, Doctor, could have been caused by the injury as stated in his history?"

Mr. Hackbert: I objected to that question, as leading. I objected further to the form of the question, as to whether or not the Doctor could say that.

The Court: Did he answer it?

Mr. Anhold: The witness said, "Say what?"

Mr. Hackbert: I said, "That it was the cause". In

other words, my objection is, to ask a doctor if he could say something.

The Court: He didn't answer it, I guess.

Mr. Waitkus: Then I came in. 'He is under oath and so I am asking him whether that is the situation or not. Would you read that question over?"

And then the question was read over by the reporter:

"Q. Would you say that that hydroma, Doctor, could have been caused by the injury as stated in his history?"

Mr. Hackbert: There is an answer to the question.

340 I objected to the question.

The Court: I will overrule it.

"A. It could have been caused. It could have resulted from, rather."

"Q. In other words, Doctor, then you say that, in your opinion, the injury which he received about a year before could have been a competent producing cause of this damage to the brain?"

Mr. Hackbert: I objected to the question, and it was withdrawn.

Mr. Waitkus: I said, "I want to ask that again."

"Q. Doctor, from the history that you had of this individual patient regarding the injury which he received to his head about a year before, would you say that that was a competent—would you say in your opinion, Doctor, with reasonable certainty, that this blow that he received was a competent producing cause of the condition that he had?"

Mr. Hackbert: I objected to that question, as leading. I renew my objection at this time. I object, furthermore, on the ground that the question referred to the history which he had received, which is not specified in the

341 question. The question is too vague and speculative to form the basis for any reasonable medical opinion.

The Court: Will the history thatt he Doctor had available be in evidence?

Mr. Waitkus: Yes. It will be in the hospital record.

Mr. Hackbert: You propose to offer the hospital record?

Mr. Waitkus: Yes.

The Court: With that connection, I will overrule the objection.

You may answer, whatever the answer is.

Mr. Waitkus: Then the question was read. I will read the question again—

The Court: You don't need to.

Mr. Waitkus: You may answer that.

"A. It could have been."

"Q. And in your opinion, Doctor, based on your previous answer, would you say that it was, in your opinion?"

Mr. Hackbert: I objected to that question, as lead-
342 ing and suggestive, and, furthermore, on the ground that it called for the Doctor to give what in his opinion was the cause, and not what in his opinion, to a reasonable degree of medical certainty, might or could have been the cause.

There is a difference between it was the cause, and it could have been the cause.

The Court: It is still a matter of opinion and weight for the jury to decide, I think; still a matter of opinion and the degree of certainty that the Doctor may have had. I will overrule the objection. You may read the answer.

Mr. Waitkus: The question was read by the reporter.

"A. I would be unable to answer that one."

"Q. Would you say that it could have been the cause of it?"

Mr. Hackbert: I objected to that, for the same reasons.

The Court: Is it answered?

Mr. Waitkus: "Would you say that it could have been the cause of it?"

"Is that right?"

343 "A. Yes."

"Q. Doctor, did this chronic subdural hydroma cause any brain damage to this patient?"

Mr. Hackbert: To that I objected, if it was an injury in a general sense, and I said, "If you want the Doctor to testify to what he saw at the time of the operation in the form of damage to the brain substance, that is a different thing, and if you want to ask him to testify as to what symptoms the man exhibited which might or could have been caused by this hydroma, but I think the question, as stated, is so vague and general as to open the door to a wide field of speculation."

Now, I call the Court's attention that the question was whether the subdural hydroma caused any brain damage.

The Court: Overruled.

Mr. Waitkus: You may answer that.

"A. I can't. Well, in the operation, there was an obvious displacement of the brain with grossly obvious atrophic changes. Period."

"Q. And the symptoms that the patient displayed, in your opinion, Doctor, would you say that the hydroma,
344 before its removal, would be the responsible cause for those symptoms?"

Mr. Hackbert: I objected to that, on the ground that the question did not specify what were the symptoms displayed or what the Doctor would have in mind in answering the question as to the symptoms the question referred to.

Mr. Waitkus: We have been talking about this hydroma; we talked about the history.

The Court: How about the symptoms?

Mr. Hackbert: You have not talked about the symptoms.

The Court: Well, unless they were connected with the history—

Mr. Waitkus: They were connected with the history.

The Court: If it has reference to what the man said his symptoms were in the history, I will overrule the objection.

Mr. Waitkus: You may answer that.

"A. Yes."

"Q. And the symptoms that I refer to, Doctor, were the symptoms that were given to you in the history
345 by the patient?"

"A. Yes."

"Q. And the symptoms that I refer to, Doctor, were the symptoms that were given to you in the history by the patient?"

"A. Yes."

"Q. And your observation of the patient, isn't that true?"

"A. Yes."

Mr. Hackbert: I objected, for the same reasons, and for the further reason that both this question and the preceding question were leading and suggestive.

The Court: Overruled.

Go ahead.

"Q. Now, Doctor, you observed this patient and also gave him some tests when he came into the hospital, did you not?"

"A. Yes."

"Q. And these tests that you gave him, those were standard tests?"

"A. Yes."

"Q. They are standard accepted tests in checking on this sort of a condition that the patient had?"

"A. Yes."

"Q. Can you give us, Doctor, a more or less simple explanation of the skull and the brain with the coverings on it—just generally speaking, so we may have a general idea?"

346 The Court: Hasn't that been gone into by the other doctor?

Mr. Peters: And by this doctor.

Mr. Waitkus: I think it has, your Honor, this part here.

The Court: I don't think you have to read all of the deposition, unless you want to.

Mr. Waitkus: I think there is only about one page of it, anyhow.

The Court: Go ahead.

"A. Shall I start with the skin?"

"Q. Yes, start from the outside, generally speaking."

"A. Well, you have the scalp overlying the cranium, composed of rather thin bone, lined on its undersurface with a thick—correction—with a general relatively inelastic membrane containing arteries and large venous sinuses. Then there is a layer of arachnoidal tissue which is connected to another layer of arachnoidal tissue (the inner layer of the arachnoidal tissue is closely adherent to the brain, the outer layer is not); between these two arachnoidal membranes is found spinal fluid which acts as a cushion for the brain; then the brain itself is then
347 surrounded by this arachnoidal fluid, generally relatively inelastic membrane and skull."

"Q. Doctor, where now, in relation to the skull, was this subdural hydroma that had been removed?"

"A. The hydroma lies between the dura, or the relatively inelastic membrane, and the outer layer of the arachnoid."

"Q. As far as this subdural hydroma that was removed from the patient, where, in relation to his head was that —his skull? Can you say whether it was on the left or the top?"

"A. It was on the left over the convexity—over the convex surface of the brain."

"Q. That is on the—"

"A. Left side."

"Q. The left side of the head. Did I understand you to say, Doctor, that the patient's right side was affected?"

"A. Yes."

"Q. Can you explain to us why that would be?"

"A. The cells from which fibers are derived which supply the right side of the body are located in the left cerebral hemisphere."

"Q. In other words, they are on the opposite side
348 from the side of the body that is affected, is that right?"

"A. The cells are on the opposite side of the body from the side of the body that is affected."

"Q. Doctor, in this case of patient Clarion Gibson, were any reflex tests given?"

"A. Yes, a general neurological examination was done.

"Q. That is a general neurological examination, and do you know what type of tests those were, Doctor?

"A. The test of motor function, examination of the cranial nerves, both motor and sensory, examination of the sensory system, examination of the reflexes, tendon reflexes, examination of gait and coordination."

"Q. Is there any particular name given to some of these tests?"

"A. Yes."

"Q. Can you give us the names of those, Doctor?"

"A. Well, there are a bunch of them."

"Q. Well, was there a Hoffman test given?"

"A. A Hoffman test, yes."

"Q. Can you tell us what that test was and what it showed?"

349 Mr. Hackbert: I said, "Are you asking the Doctor to testify to the results of tests that he performed or at which he was present?"

"Q. Did you give these tests, Doctor?"

"A. Yes."

"Q. Okay. You may tell us about it, Doctor."

"A. You want me to explain what the Hoffman test is?"

"Q. Yes, to explain."

"A. The Hoffman test is a reflex which consists of flicking the first or the second terminal phalanx with resultant flexion—reflex flexion of the thumb."

"Q. And do you know what showed in this case?"

"A. This was a positive reaction on the right side."

"Q. And what did that indicate when you say there was a positive reaction, Doctor?"

"A. Usually, when this test is definitely positive, it is suggestive of damage to the pyramidal system which is the system that controls motor functioning."

"Q. And were there any other reflex tests given at that time?"

"A. Yes. I did—the patient had a positive Bab
350 inski."

"Q. Will you explain that, Doctor, please.

"A. That consists of stroking the outer sole of the foot with resultant fanning of the small toes and drawing back of the big toe."

"Q. And what did that indicate, if anything?"

"A. That was positive evidence of pyramidal tract disease."

"Q. You say 'pyramidal tract disease'. You mean pyramidal tract damage?"

"A. Pyramidal tract damage."

"Q. That is—by that you mean damage to the brain?"

"A. Not necessarily."

"Q. What do you mean by saying 'not necessarily'?"

"A. The pyramidal tract runs from the cells of the region in the opposite side of the cortex through the base of the brain where it crosses to the opposite side and then runs through the spinal cord where it synapsis with cells in the spinal cord from which are derived nerve roots which then connect with sensory fibers and exit to various parts of the body. A positive Babinski then can result from damage to these tracts before exiting from the
351 spinal—before seeping in the spinal cord with cells from which are derived the nerve roots."

"Q. Well, were there any other reflex tests given that showed positive damage?"

"A. Reflex tests?"

"Q. Yes."

"A. Showing positive damage, no."

"Q. Well, were there any other reflex tests given that would indicate any pyramidal tract involvement?"

"A. Presumptively, yes, but you can't really say, I don't think. That is, usually hyperactivity of those reflexes is present, in these cases on the paralyzed side."

"Q. Were these different tests all positive?"

"A. Yes."

"Q. Doctor, after this operation—strike that. When

was this operation performed on Mr. Gibson—that is, for the removal of the subdural hydroma—do you recall?"

"A. Can I look at the records or not?"

Mr. Hackbert: I said "October 6th, 1952."

"Witness: October 6th? I don't remember the date. It was probably around eleven o'clock it was started, maybe ten thirty. I am not sure about that."

352 "Q. After the operation, Doctor, was there any subsequent time that you saw Mr. Gibson?"

"A. I saw him every day once, twice, or three times until he was discharged from the hospital."

"Q. Was there any improvement after the discharge, Doctor?"

"A. Yes. It was temporary."

"Q. And after that first operation, did you perform any other operation?"

"A. I did not perform any other operation, no, but another operation was performed."

"Q. Was there another operation performed?"

"A. Yes.

"Q. Were you present at that time?"

"A. Yes."

"Q. Can you tell us what that was?"

"A. That was the removal of the purulent fluid present in the subdural space."

"Q. Can you tell us was that an aftermath of the first operation?"

"A. Yes.

"Q. Was that an infection?"

"A. Yes."

"Q. Is that what you call an abscess?"

353 "A. Yes."

"Q. And, after that was performed, you say you saw Mr.—"

"A. Rather than the purplent abscess you gave, it is an ampyema."

"Q. This empyema that you speak of, can you explain the type of operation that was?"

"A. It is the same type of operation, for which we merely re-opened the wound that had been previously made probably in about two weeks—maybe ten days or two weeks."

"Q. That would be about the 22nd?"

"A. Yes."

"Q. Of October?"

"A. Re-opened the wound and drained the accumulation of pus, placed a plastic drain in this area which we intended to irrigate with antibiotics."

"Q. Then, after Mr. Gibson left the hospital, Doctor, —did you see him before he left the hospital after this last operation?"

"A. Before he left during his first admission to the hospital?"

"Q. After his first?"

"A. During his first?"

354 "Q. Yes."

"A. After the second operation?"

"Q. Yes."

"A. Yes."

"Q. Can you tell us whether at that time his gait was improved in any way?"

"A. Yes, it was."

"Q. Did he have any weakness in the arm at that time?"

"A. Yes."

"Q. And on subsequent occasions did he come back to the hospital?"

"A. Yes, he did."

"Q. And did you see him?"

"A. Yes."

"Q. And can you tell us approximately how often he came back to see you?"

"A. No, I can't."

"Q. It was more than one occasion, was it not?"

"A. Yes, I saw him more than a year afterwards."

"Q. And the last time you saw him did he still have the same impairment to his gait?"

Mr. Hackbert: I object, and the question was withdrawn.

"Q. Doctor, on each visit to the hospital, would 355 he be told when he would have to return again for examination by you?"

"A. In a general way."

"Q. And then they would call in and make the appointment, is that it?"

"A. Right. I don't know what he did, but most of the people made the appointments, at the time that they were seen, for the next appointment."

"Q. For the following visit, is that it?"

"A. That is right."

"Q. And the last time you saw him, Doctor, would you say that his gait and weakness in the arm were still present?"

Mr. Hackbert: "I object to that. The time he last saw him is not specified nor the circumstances nor the extent of the observation; furthermore, the question is leading."

The Court: Objection sustained.

"Q. Would you like to refresh your recollection from the records then?"

"A. Yes."

"(Mr. Waitkus hands records to witness)."

"Witness: For some reason it isn't in here."

"Q. You mean the last visit?"

356 "A. Yes."

"Q. Well, from your records there, Doctor, can you approximate the time that you saw him?"

"A. Well, let's see. I would say it was just about a year ago."

"Q. Just about a year ago?"

"A. Just about a year ago."

"Q. And at that time, Doctor, was there any marked improvement?"

"A. No, there wasn't."

Mr. Hackbert: I objected to the question on the ground that it was leading, I renew the objection, and move to strike the answer.

The Court: Objection overruled, and motion denied.

"Witness: There was no improvement."

"Q. At the last time you saw him, Doctor, can you tell us what his condition was?"

"A. As far as paralysis goes, he still had marked impairment of the arm and leg on the right side."

"Q. Would you say then, Doctor, that his condition, as he now is, or was at the time you saw him last, would be permanent?"

357 Mr. Hackbert: I objected to that, as leading, and I renew the objection.

The Court: Overruled.

"A. This is difficult to state but, from observation of other cases, I would say yes."

"Q. Doctor, while you were in the hospital, did you perform or assist in the performance of any other brain operations?"

"A. Yes."

"Q. How many have you assisted or performed while there?"

"A. I don't have adequate records with me here but I would suppose close to two hundred fifty to three hundred brain operations."

"Q. And you are doing that sort of work now, Doctor?"

"A. That is right."

"Q. When did you leave the Chicago hospital Doctor?"

"A. I think around the 15th of July."

"Q. Of this year?"

"A. Yes. No, June."

"Q. You have been practicing now in Indianapolis about how long?"

358 "A. Since about the 22nd of July."

"Q. Doctor, referring to the records of the hospital shown as E-18, E-19 and E-20—part of E-20—will you look at those and see whether those were made by you."

"A. All except this last one."

"Q. All except that last part of E-20?"

"A. Yes."

Mr. Hackbert: "That is the part that follows the date 11-10-53?"

"A. That is right."

"Q. Now, during the time that some of these other tests were taken and other work was performed, were you also present at those times, although not necessarily making any notes?"

"A. On this particular patient?"

"Q. Yes."

"A. Yes."

"Q. Can you tell us where Dr. Hoffman is now?"

"A. Dr. Hoffman is deceased."

"Q. I believe you mentioned Dr. Ralson also?"

"A. Dr. Ralston."

"Q. Can you tell us where he is?"

"A. Last I heard from him he was at National Institute for Nervous Diseases of the Blind, Bethesda,

359 Maryland."

"Q. And now, Doctor, assuming that a man, age forty-seven or forty-eight, was married and was employed as a timekeeper by the E. J. & E. Railroad, while stooping under a desk to put a piece of equipment, as an adding

machine, slips, loses his balance and, in coming up, hits the top of his head on the bottom of the desk and is dazed for several minutes and, for several days after that, has headaches, and subsequently, several months thereafter, he begins to feel a weakness in his right leg, although he is still performing his work, and also begins to feel a weakness in his right arm and hand, which subsequently got worse, and he had a decided limp and drag to his right leg and subsequently in September—strike out "September"—subsequently, within the year, went to a hospital where they diagnosed the patient as having a subdural hydroma on the left side, which was associated with cerebral atrophy, and that this hydroma was removed and drained and, within two or three weeks after the removal or drainage of the hydroma, an infection had set in, called either an abscess or an empyema, which was also drained, and that since that time the patient still
360 has the drag or limp to his right leg and weakness in the right arm and hand, and he has not worked at his employment or any kind of work since he left the hospital after the last operation, will you tell us, Doctor, whether, in your opinion, with reasonable certainty, this blow or bump to his head was the competent producing cause of the condition I have described to you?"

Mr. Hackbert: "Now, first of all, I reserve the right to object to the question for the inclusion of any assumption that is not substantiated by competent evidence at the trial." I no longer make that objection.

"I object to the question in its form as leading and, furthermore, as calling for the opinion of the doctor as to what was, in fact, the competent producing cause."

The Doctor changed the form of the question by his answers, so I will not press that objection now.

The Court: All right.

"Mr. Waitkus: We are asking whether in his opinion."

"Mr. Hackbert: His opinion as to what it is in
361 fact."

"Mr. Waitkus: That is right. The question is, 'Will you tell us, Doctor, whether, in your opinion, with reasonable certainty this blow or bump to his head was the competent producing cause of the condition I described to you?' "

"Witness: Can I ask a question?"

Mr. Hackbert: I said, "Sure".

"Witness: When you say a 'competent producing cause' what does that mean, exactly?"

"Mr. Waitkus: Well, whether, in your opinion, that blow could have caused it."

Mr. Hackbert: I said, "Now, your question is, could it have caused it?"

"Mr. Waitkus: Was the competent producing cause."

"Witness: Could have been a competent producing cause?"

"Q. Yes."

"A. It could have been."

"Q. And, in your opinion, with reasonable certainty, what is the prognosis with respect to the future course of these conditions?"

Mr. Hackbert: I have no objection to that question.

362 "A. Well, I have only to say that, after examining this patient for two years post-operatively, at which time there has been no improvement, I would say that the condition, as it now stands, is permanent, probably—is probably permanent."

"Q. Now, to be sure that I have it all in, again, Doctor, the question I asked you, assuming that the man was Clairon Gibson, would your answer be the same?"

Mr. Hackbert: Now, to that, your Honor, I object.

The Court: Sustained.

"Q. Doctor, would you go through the hospital records here. Other than the 18, 19, 20—strike that. 18, 19, 20 were the only ones that you prepared personally?

"A. No. I am not sure on this page. Is that E-C3?"

"Q. E-63."

"A. I may not have. I am not sure, whether my actual writing appears there or not. It looks something like mine. I may not have actually recorded those."

363 "Q. In these types of cases where there is a hydroma that is caused by an injury—trauma—does the trauma have to be severe or can it be slight?"

"A. It can be slight."

"Q. In a subdural hematoma or a hydroma, you say that there is bleeding. Would that be also called a hemorrhage by the average layman?"

"A. In a subdural hematoma, yes."

"Q. Doctor, do you have any opinion, based upon reasonable certainty, of the age of this hydroma that was removed from Mr. Clairon Gibson?"

"A. I would say that it was over six weeks in age."

"Q. Over six weeks in age. What limit would you put on it?"
"A. No limit."
"Q. Well, by 'no limit,' you have no definite way of knowing, is that it?"
"A. That is right."
"Q. But, at least, it would be six weeks?"
"A. Yes."
Mr. Waitkus: I believe that is all.
The Court: We will take a short recess.

(A short recess was taken.)

364 Mr. Hackbert: Mr. Anhold, if you will please be good enough to play the part of the Doctor for me, too—
Mr. Anhold: Yes.

"Cross-Examination by Mr. Hackbert.

"Q. Doctor, to go back to your medical training, as I understand it, you graduated from the medical school at Indiana University in 1946?"
"A. That is right."
"Q. And you immediately went into the Navy then as a doctor?"
"A. No, sir."
"Q. How long after that was it before you went in the Navy?"
"A. It was in July, 1947."
"Q. That is right. You had your internship?"
"A. That is right."
"Q. Where did you serve your internship?"
"A. Indianapolis General Hospital."
"Q. Then, after you had served your internship, you went into the Navy?"
"A. That is right."
"Q. You served in the Navy for how long?"
365 "A. From July, 1947, to, I think it was, the 28th of July, 1949."
"Q. And what was the nature of your medical work in the Navy during that two-year period?"
"A. I was stationed at Long Beach Naval Hospital at Long Beach, California, from July, 1947, to March, 1948, at which time I was on the orthopedic service. We dealt

with fractures, dislocations of bones, infections in bones. I was then in the general practice of medicine and some general surgery in the United States Naval Dispensary at Hawthorne, Nevada.

"Q. Until the end of your—

"A. Until the end except for the time it took me to be discharged."

"Q. Yes. I am talking about your actual medical work. Then, as I understand, you went into the private practice at Red Key, Indiana, until the summer of 1951?"

"A. Right."

"Q. And what was the nature of your practice there?"

"A. General practice, assisting in surgical operations."

"Q. And what size and type of community is Red Key?"

"A. It is a community of around—I would say in
366 the town there is about 1700 people."

"Q. And your practice there was a general small-town practice?"

"A. Practice, yes. I did everything."

"Q. And I take it, it was some time toward the end of that period that you determined to make a break and go into neuro-surgery?"

"A. No. I had determined that long before then."

"Q. The opportunity to make the break came then?"

"A. Came, that is right."

"Q. And, in order for you to qualify as a neuro-surgeon, it became necessary for you to spend a year in general surgery and then three years in neuro-surgery?"

"A. That is right."

"Q. And where you spent the general surgery in that course of qualifications was from the summer of 1951 to June, 1952, here at Indianapolis General Hospital?"

"A. Indianapolis Methodist Hospital."

"Q. Methodist Hospital. And then the period of time that you spent in the University of Chicago clinics was your three-year period of treatment in neuro-surgery?"

"A. That is right."

367 "Q. When was it that you began your residency in the University of Chicago clinics?"

"A. July, 1952."

"Q. So that you had been there in the clinics as Assistant Resident in neuro-surgery from July to October?"

"A. That is right."

"Q. When you first saw Mr. Gibson?"

"A. Yes."

"Q. Prior to the first time you saw Mr. Gibson, had your experience in neuro-surgery been limited to that period of three or four months that you had already been in there in the University of Chicago clinics?"

"A. No."

"Q. What other experience in neuro-surgery had you had prior to that time?"

"A. Well, at Methodist Hospital I was on the neuro-surgical staff for a period of about six months."

"Q. So that, in all, you had then some nine or ten months in being on the neuro-surgical service?"

"A. That is right."

"Q. Now, who was the doctor in charge of Mr. Gibson at the University of Chicago clinic?"

368 "A. Dr. Rasmussen."

"Q. And he is the man you referred to as being Professor of Neuro-Surgery?"

"A. That is right."

"Q. So far as the operation itself is concerned, that is the first operation, that was performed by Dr. Hoffman?"

"A. That is right."

"Q. And Dr. Hoffman performed the second operation for the drainage of the area?"

"A. That is right."

"Q. And Dr. Ralston was Dr. Hoffman's first assistant, and you were second assistant?"

"A. That is right."

"Q. Did you, yourself, take the history from Mr. Gibson at the time he entered the hospital?"

"A. At the time he entered, no."

"Q. Who did take that history, if you know?"

"A. Dr.—I can't say."

"Q. Would you recognize the handwriting or is it a matter of not remembering, Doctor?"

"A. I don't remember the—there are two doctors took the history."

"Q. Look at page E-7 and tell us whose handwrit-
369 ing that is."

"A. This history was taken by a doctor that was on another service. He wasn't on our service."

"Q. On what service was the patient at the time this history was taken?"

"A. Dr. Schulman's service in neurology."

"Q. Where do you draw the line of distinction between neurology and neuro-surgery?"

"A. Neuro-surgery deals with surgical treatment of diseases of the nervous system in a general way."

"Q. And neurology deals with what?"

"A. With the medical management of neurological diseases."

"Q. So, at the time Mr. Gibson came into the University of Chicago clinics, he was on the neurological service, or the medical treatment as opposed to surgical treatment, and that was the service he was on at the time his history was taken?"

"A. That is right—his first history was taken."

"Q. Was a subsequent history taken at the time he came onto the neuro-surgery system?"

"A. Yes."

"Q. I said 'system.' I meant service. Do you know who took that history?"

370 "A. Dr. Ralston and I believe Dr. Fand. I am not sure."

"Q. Would Dr. Fand be the one who was the medical student or the externe you described?"

"A. The interne—interne of the neuro-surgical service. That should be in there. I really didn't check to see."

"Q. Let me show you E-15, 16, and 17, and I will ask you was that the history given in the neuro-surgical service?"

"A. No, it isn't. It was the interne on the neurology service did that."

"Q. The first time you saw Mr. Gibson was the day before the operation was performed—the first operation, that is?"

"A. I can find out easily enough if I look at the record."

"Q. All right. (Hands record to witness.)"

"A. I saw the patient with Dr. Hoffman the 4th of October, two days before the operation."

"Q. And then you performed this pneumo-encephalogram yourself, did you?"

"A. Yes."

"Q. And what is the technique by which that is 371 done?"

"A. The patient is sitting. A lumbar—spinal puncture, in ordinary laymen's terms."

"Q. Yes."

"A. A spinal puncture is done and fluid is removed

slowly and intermittently, replaced with oxygen. The X-rays then are taken."

"Q. And it is from his study and interpretation of the X-ray films that the doctor reaches a diagnosis or whatever conclusion he can make at that time?"

"A. That is right."

"Q. Did you interpret the X-ray films yourself or were they being interpreted primarily by someone else and just more or less observed by you?"

"A. Well, of course, we all make our own interpretation, and, actually, it was the operator's responsibility. Of course, Dr. Hoffman had to make the final decision."

"Q. The pneumo-encephalogram shows only what the existing condition is at the time the X-ray film is taken and doesn't of itself disclose anything as to the length of time the condition has persisted, does it?"

"A. Right."

372 "Q. How soon after the pneumo-encephalograms were taken—I assume there was more than one X-ray film?"

"A. Yes."

"Q. About how many films were there?"

"A. Thirteen."

"Q. How soon after those films were taken was the operation performed for the removal of the hydroma?"

"A. Within a few hours."

"Q. I take it there is a means by which the oxygen is removed and the spinal fluid is replaced?"

"A. You mean in the ordinary system?"

"Q. Yes, and in this particular system. What was done here?"

"A. Well, ordinarily, over a period of several hours of testing, the body absorbs the fluid. The oxygen replaces the used fluid."

"Q. What was done in this case, where the operation followed so shortly after taking the pneumo-encephalogram?"

"A. Well, fluid still remains, even though you remove as much as you can, so some errant fluid it does possess in the state of approximately what it was at the time the pneumo-encephalogram was taken."

"Q. In the taking of the pneumo-encephalogram,
373 you don't remove any considerable amount of spinal fluid?"

"A. We remove all we can which, in ordinary cases, is about three ounces."

"Q. What effect does that have on the condition of the brain as you will find it on operating a few hours later?"

"A. Sometimes there is some increased swelling of the brain."

"Q. Does it have any effect on the hydroma? Does that tend to expand in that period of time following the removal of the spinal fluid?"

"A. Since this was not communicating, I don't believe so. It may have, I suppose, expanded."

"Q. In the operation itself—first operation—what part did you, yourself, perform?"

"A. Actual work I did?"

"Q. Yes."

"A. A second assistant does the retraction of the brain and handing instruments to the operator, working the electric cautery, observing."

"Q. Were you so positioned that you could observe what was done in the course of the operation and what was visible at the time that the operated area was open to view?"

374 "A. Yes, sir. I can do that without even assisting.

"Q. Are you able to give us any approximation of the size and appearance of this outer membrane of the sac?"

"A. The membrane itself is sort of a dull grayish color, which I would judge in this case was about three or four millimeters in thickness."

"Q. And what were the overall dimensions of the sac? Can you relate it to the size of any other object a layman would be familiar with?"

"A. No, because it is sort of flat and sort of like an object weighed down—shrunken."

"Q. Is the sac a structure that is movable?"

"A. No. It is removable."

"Q. Yes, but I mean is it something like—

"A. A balloon."

"Q. A balloon might be filled with water and the shape of which you can change if pressure is applied to one part or another of it. Is a sac like, we will say, a lemon or something of that kind?"

"A. It is more like a balloon with inelastic walls—with walls which will not stretch."

"Q. May the shape of the sac be changed at all if
375 pressure is applied?"

"A. It can be changed, but nobody ever applies pressure, naturally."

"Q. In the performance of the operation you undertake to remove the entire membrane and all of the contents?"

"A. Yes."

"Q. Would you do that as a single unit or do you open and, in this case, did the doctor open the sac and drain off the fluid and then undertake to remove the membrane?"

"A. Yes, sir."

"Q. And did you notice in your observation of this man as a patient under your care, at least partially, any irregularity in the formation of his skull?"

"A. Yes."

"Q. And what is that irregularity?"

"A. There was an asymmetry of the skull, the left side being more prominent than the right."

"Q. And is that a normal or an abnormal condition?"

"A. That is often found in normal people."

"Q. And where was the asymmetry or the difference in shape on the left side of the skull as compared with
376 the right with reference to the point at which the subdural hydroma was later found?"

"A. It was on the same side, and I think that the asymmetry was generalized over the entire side. I am not sure."

"Q. So there was no particular relationship between the difference in the shape of the skull on the left side and the area occupied by the subdural hydroma?"

"A. Except that it was on the same side."

"Q. I mean it wasn't a case of there being a bump on the skull right over the hydroma?"

"A. No."

"Q. Did you also observe, on the operation, that there was an old brain deformity present on the left side of the brain?"

"A. Yes."

"Q. Was that a condition which was, in your opinion, caused by or resulting from the presence of the hydroma, or was that a condition which had existed prior to the formation of the hydroma?"

"A. I don't believe anyone could answer that. I think that it could be a result of the hydroma. It could be a result of brain damage."

"Q. Bearing in mind that there is this asymmetry
377 of the skull, or difference in the shape of the left and right sides of the skull, do you have an opinion as to whether or not that indicates anything with reference to the time the difference in the shape of the brain had manifested itself?"

"A. No, but ordinarily it is just the opposite way around. If there is an atrophic lesion on one side, that side may be smaller."

"Q. Was the left side of this man's brain smaller than the right side?"

"A. The left side, yes, but the skull wasn't."

"Q. The skull was larger?"

"A. The brain was smaller because it was down in a hole. I don't know what the conditions were, say a year, or even a day, before he was operated on."

"Q. Is it possible that, as this man's body and head developed, that there was a space there between the brain and the skull on the left side?"

"A. A space? You mean filled with what?"

"Q. Filled with anything?"

"A. There is always a space there."

"Q. I mean, was there an abnormal space?"

"A. It is possible, absolutely."

"Q. Was the space—"

378 "A. But there was no manifestation of any such thing before."

"Q. As I understand it, this man's skull was larger on the left side than the right side, but the brain was smaller on the left side than on the right side?"

"A. That is right."

"Q. Do you have any opinion as to— strike that. Did this subdural hydroma occupy the entire abnormal space between the left hemisphere of the brain and the left side of the skull?"

"A. No."

"Q. Are you able to give us an opinion as to what portion of that abnormal space was occupied by this hydroma?"

"A. Roughly, about one-half."

"Q. And the abnormal open space there extended toward the back of the head from the area in which the hydroma was located, is that true?"

"A. The abnormal space?"

"Q. Yes."

"A. No."

"Q. Was the abnormal space centered more or less in the front part of the left side of the skull?"

"A. In the central portion."

"Q. Central portion. Is a subdural hydroma a
379 condition which is found fairly often in the course of your neuro-surgery?"

"A. No."

"Q. Is it a relatively rare condition?"

"A. Yes."

"Q. What besides a blow or trauma can cause a subdural hydroma?"

"A. What can cause it?"

"Q. What other causes are there?"

"A. Much less frequent causes are empyemas or the presence of abscesses in the brain, the occurrence of a subarachnoid hemorrhage, with the development of a subdural hematoma and liquefaction of the clot. Other conditions may be abnormal bleeding tendencies—the spontaneous bleeding such as you see in hemophiliacs or purpura and leukemia. There are probably some other conditions."

"Q. Is there, so far as you know in your medical experience, any relationship between the likelihood of the onset of a subdural hydroma or a subdural hematoma and the existence of an abnormal space between the brain and the wall of the skull?"

"A. There cannot be an abnormal space unless there is a subdural hydroma."

380 "Q. Well Doctor, let me ask you this: is this space which was found upon operation between the smaller left hemisphere of the brain and the larger left side of the skull something that followed the onset of the subdural hydroma, or is it a condition that existed there before the hydroma was ever formed?"

"A. It follows the subdural hydroma."

"Q. Does a subdural hydroma have some effect then in causing the skull to bulge out?"

"A. Does it have?"

"Q. Yes."

"A. In children it will—should."

"Q. In a man of the age of Mr. Gibson—a man in his late forties or early fifties—will the growth of a subdural hydroma cause a bulging of the skull?"

"A. Sometimes."

"Q. In this man's situation, however, as the condition was disclosed upon operation, only about half of this abnormal space was occupied by the hydroma?"

"A. That is right."
"Q. What occupied the remainder of that space?"
"A. Brain and subarachnoid fluid. There was no space there, see"
381 "Q. No empty space? Do I understand that?"
"A. No."
"Q. But there was an abnormal space there?"
"A. Yes."
"Q. And how had that brain and subarachnoid fluid entered into that space? Is that a normal condition?"
"A. No. The brain would not enter into the space. It was outside of this abnormal space, but ordinarily there is no space, you see."
"Q. I see. In the normal case, the brain is overlain by these arachnoid layers and then the dura and it fits—
"A. Snugly."
"Q. Snugly within the skull?"
"A. That is right."
"Q. However, there is the arachnoid fluid which serves as a cushion?"
"A. Right."
"Q. So that the brain doesn't rattle around inside the skull?"
"A. Right."
"Q. And all of the area inside the skull is occupied either by fluid or by the coverings of the brain or by the brain substance itself?"
382 "A. That is right, or by blood vessels."
"Q. There aren't any empty spaces?"
"A. That is right."
"Q. In the normal set-up there?
"A. Correct.
"Q. However, in this man's—within this man's skull, as you opened it up and observed it upon operation, there was an abnormal area occupied in part by this hydroma and in part by fluid? I must be wrong. I see you are shaking your head."
"A. No."
"Q. Will you tell me what occupied the space—this abnormal amount of space?"
"A. The hydroma.
"Q. Did the hydroma occupy the entire amount of abnormal space?"
"A. Yes."
"Q. I thought you said, in answer to an earlier question, it occupied only about half of the abnormal space?"

"A. No, half of the space covering the hemisphere."

"Q. Oh, I see. But the empty amount of abnormal space was occupied by the hydroma?"

"A. That is right. I am sorry."

383 "Q. I take it there is no standard scale of growth or progression for a subdural hydroma?"

"A. Right."

"Q. They may grow slowly or swiftly?"

"A. Right."

"Q. And do they always continue to progress or do they reach a stage at which further progression or further growth stops?"

"A. They can stop."

"Q. What is normal—progression or stoppage?"

"A. Progression."

"Q. And the rate of that progression varies between individuals?"

"A. Right."

"Q. And the shape that the hydroma takes, is that always following a certain pattern, or may that, in turn, vary as between individuals?"

"A. They may vary, of course, but it is usually present and parallels the surface of the most outermost portion—naturally, follows the contour of the skull. Localized bulgings into the brain are possible, but it is more or less a generalized thing in the area of the hydroma."

"Q. About how thick was this entire hydroma?"

384 "A. Well, it was the outer membrane that was against the dura, and the brain lay within four centimeters of the dura."

"Q. So it was about four centimeters thick at the time?"

"A. Probably in its original—"

"Q. And the length and the width? Can you tell us what the size of it was?"

"A. Well, I can't tell you. The sac membrane, I think, is disclosed in the report as being ten centimeters in diameter, which is about four inches."

"Q. Was it approximately circular in shape, oval, or irregular, or what?"

"A. Approximately oval in shape."

"Q. As I understand it, from your answers to Mr. Waitkus's questions, you do have an opinion that this hydroma must have exisied at least from six weeks to two

months, but for how long a period of time you are unable to tell from the—

"A. That is right."

"Q. —hydroma itself. When you say that it existed for six weeks to two months, at least, do you mean by that from the very first seepage of fluid into that area only that length of time had elapsed, or only that length of time must
385 have elapsed, or that the hydroma had been in approximately that same size and shape for at least that period of time?"

"A. No, that the membrane which surrounded it had been there long enough for certain fibres to be formed."

"Q. Do you mean by that that the membrane, as you found it in the size which you found in the operation, must have been there that length of time?"

"A. No; only the membrane itself had been there that length of time."

"Q. And the length of time prior to that that the hydroma had been there depended upon the period of time that symptoms of the brain tumor had been present?"

"Mr. Waitkus: Just a minute. You said 'brain tumor'."

"Mr. Hackbert: I said the period of time the symptoms of the subdural hydroma had been present."

"Witness: I don't understand the question."

"Mr. Hackbert: Let me withdraw the question. I think I got involved in it myself. This man, at the time you first saw him, exhibited certain symptoms that were consistent with the existence of a subdural hydroma, did he not?"

386 "A. Correct."

"Q. And your course of observation and diagnosis was doing the pneumo-encephalogram, which tended to confirm that preliminary diagnosis, is that right?"

"A. Well, the diagnosis originally was a space-consuming lesion on the left side of the brain."

"Q. That might be a hydroma?"

"A. A tumor."

"Q. Or some other kind of a growth that was more firm in character?"

"A. That is right."

"Q. The pneumo-encephalogram narrowed it down to a fluid containing an object or lesion?"

"A. That is right."

"Q. And, of course, the operation itself confirmed that that was what actually was there?"

"A. Yes."

"Q. My question now is this: when do the objective symptoms of the existence of such a growth within the brain first manifest themselves with reference to the time when the hydroma begins to develop and, we will say, reach a certain size?"

"A. Usually within a few weeks; sometimes, not for many, many months."

387 "Q. So that you are able then, from a medical standpoint, to relate back the start of the presence of the subdural hydroma to a point in time prior to the appearance of the first symptoms?"

"A. Yes."

"Q. In other words, the symptoms don't occur before; the symptoms follow the growth of the hydroma to a point where it begins to exert some pressure on the brain?"

"A. Right."

"Q. And, as it exerts that pressure on the brain, the symptoms, such as weakness of the extremities or limping or inability to fully use the hand or arm begin to appear?"

"A. Yes."

"Q. Now, in the hypothetical question as it was given to you, and, first of all, in that it was your understanding, was it not, that the symptoms of a change in gait and weakness in the arm first manifested themselves after this blow on the head as he was stooping under the desk?"

"A. That's my understanding according to the hypothetical question."

"Q. And that generally—was that generally your
388 understanding of the situation as it was contained in the man's history, as the history was an element in the questions that were given to you?"

"A. Actuelly, the man stated, according to the history, that, approximately at the beginning of his symptoms, he had sustained a head injury which had dazed him. What was that question?"

" 'ending question read by reporter): And that gen y—was that generally your understanding of the situation as it was contained in the man's history, as the history was an element in the questions that were given to you?"

"A. That was my understanding according to the history."

"Q. Your answer to those questions were all on the theory the bump on the head preceded the initial appearance of the disturbance in gait or weakness in the extremities?"

"A. Yes."

"Q. If the fact were that this man had manifested a disturbance of gait prior to the time of this incident of bumping his head on the desk and crawling out from under it, your opinion would have to be different, would it not?"

389 "A. Yes."

"Q. As to the controlling relationship between the bump on the head and the hydroma?"

"A. It would have to be different in that, if the hydroma preexisted the injury, that any further trauma to the head could only aggravate this condition."

"Q. It couldn't have been, of course, the cause?"

"A. It couldn't have been the cause."

"Q. Does it make any difference where on the outside of the head the blow occurs as to the area in which the hydroma will develop?"

"A. No."

"Q. And I understand from one of your earlier answers that the severity of the blow is not a significant factor?"

"A. It certainly occurs more often in people that have significant blows but does not necessarily have to be a severe blow."

"Q. Of course, a really severe blow sufficient to cause a skull fracture would be more likely to lead to a hydroma?"

"A. That is right."

"Q. Than a minor tap?"

"A. Yes."

390 "Q. Do you have an opinion, based upon the observation that you made at the time of the examination, as to whether or not there was any brain damage or brain deformity present in this man's case prior to the onset of the hydroma?"

"A. No one can say that."

"Q. Might or might not?"

"A. Might or might not."

"Q. Did you and your associates, Dr. Ralston, Dr. Hoffman and Dr. Rasmussen, discuss among yourselves the question as to whether or not there had been some brain deformity present prior to the initial formation of the hydroma?"

"A. Yes."

"Q. Was there any conclusion of any kind reached in the course of your joint discussion of that problem?"

"A. Well, of course, that is hypothetical, and I think the opinion was that the subdural hydroma was the result—

was the cause of the brain damage rather than the brain had been damaged by a pre-existing condition, although no one can say for sure. If you will notice, in Dr. Rasmussen's notes, Dr. Rasmussen, as you will note, expected con-
391 tinued improvement, which would not be the case, of course, if there was marked pre-existing—if the damage that was present was pre-existing. That is on pages—it is right in front of his chart. I don't know where it is now. It is hand written notes. Right here, page E-6."

"Q. That is Dr. Rasmussen's note under date of December 4, 1953?"

"A. Yes, December 4, 1953. We talked about that. No definite conclusion could be made for sure, but the fact that he had improved led us to believe that, certainly, the subdural hydroma was producing additional damage."

"Q. Showing you page E-1 and E-2, can tell us by whom that information was prepared or taken?"

"A. Prepared by Dr. Bruce Ralston and countersigned by Dr. Rasmussen."

"Q. Were you familiar at the time that, under Point Number 1 of Therapeutic Procedures, this report at that time states, 'It is possible that this was superimposed on some previous brain damage because of the deformity of the brain in the region of the left Sylvian fissure.' Was that a conclusion that was expressed at one of your joint
392 conferences by one or more of you?"

"A. That wasn't necessarily a conclusion. That was a thought, and also the other side was taken up, too. It is conceivable a subdural hydroma can produce that atrophy. I have seen it on several occasions."

"Q. I assume the initials 'B.L.H.' are Dr. Hoffman's initials?"

"A. That is right."

"Q. In your notes, page E-35 of the hospital record expresses this: 'After the membrane had been removed, the brain was seen to be approximately four centimeters from the surface at its greatest depth. It had the appearance of failure of development or atrophy of,' (I believe that word is) 'opercular region.'"

"A. That is correct."

"Q. A failure of development of that region would be a congenital condition existing from birth, would it not?"

"A. That is right."

"Q. An atrophy of that region would be a condition that had developed subsequently?"

"A. Yes."

"Q. And, further, Dr. Hoffman's notes, on page 36, comments: 'This was the removal of a chronic subdural
393 hydroma with its old thick membrane.' By the way, Doctor, how many operations of a similar character, involving the removal of a subdural hydroma, have you participated in?"

"A. A chronic subdural hydroma?"

"Q. Yes."

"A. I would say about three or four or five."

"Q. Of those operations, how would you rate the thickness of the membrane in this case?"

"A. It was moderately thick."

"Q. Then Dr. Hoffman's notes go on, 'It is possible that this was superimposed on some previous brain damage because the deformity of the brain in the depths of the left Sylvian fissure is quite extensive.' First of all, Doctor, may I ask, did you observe the deformity of the brain in the depths of the left Sylvian fissure?"

"A. Yes."

"Q. And was that damage quite extensive?"

"A. Yes."

"Q. Will you describe the appearance of that damage?"

"A. Yes. The convolutions of the brain were compressed and smaller than usual."

"Q. Over how much of an area?"

394 "A. Oh, an area of about, I would say, probably five to six centimeters."

"Q. Is that condition, which may be congenital in origin—strike that. Is that a condition which may be congenital in origin?"

"A. Atrophy? It is possible that it could."

"Q. Is it possible that that condition could have existed in this man's brain prior to the onset of the hydroma?"

"A. Yes."

"Q. If that condition had existed prior to the onset of the hydroma, would that have been a condition which was, in laymen's terms, receptive to the forming of a hydroma, or, in other words, would have made it likely that a hydroma would develop there?"

"A. No."

"Q. In your opinion, was it possible that this chronic subdural hydroma had been superimposed on some previous brain damage?"

"A. I would say no to that question."

"Q. Was there anything unusual about the infection which subsequently developed and was the occasion for the second operation?"

"A. No."

395 "Q. That is something that may very well happen in a brain operation of this character?"

"A. Yes. You see you leave drains in, and drains sometimes lead to infection. You leave a foreign body inside that hole, see."

"Q. Is it your opinion, Doctor, that the partial loss of function of this man's extremities on the right side, the partial paralysis, was due to the pressure of this hydroma on the brain?"

"A. Yes."

"Q. Now, the purpose of the operation was to relieve that pressure?"

"A. Yes."

"Q. And, upon the operation—"

"A. No, the purpose of the operation was to relieve the pressure and to prevent further damage—an attempt to."

"Q. And, in the operation, the sac, or hydroma, which was present in the brain, was removed?"

"A. Yes."

"Q. And, consequently, the pressure on the brain was removed?"

"A. Right."

"Q. But, at the time you last saw this man about 396 a year ago, which would be approximately two years after the accident, he still had, to some degree, this partial paralysis of the right side?"

"A. Yes."

"Q. Had it been improved over the time you first saw him?"

"A. No."

"Q. During the period of time you had occasion to observe him as a patient, either in his initial stay in the hospital, or in his subsequent visits to you, did you observe any significant change in the extent of that partial paralysis?"

"A. There was some change."

"Q. What was that?"

"A. Improvement."

"Q. For how long did that improvement continue to manifest itself?"

"A. Well, he continued to improve very, very slightly over a period of a year."

"Q. And did his condition then remain level or get worse?"

"A. More or less level."

"Q. More or less level?"

"A. Very, very slight."

397 "Q. There was some improvement for about a year?"

"A. Yes."

"Q. Since that time he has been about constant?"

"A. Right, as far as I know. I haven't seen him since a year ago, so what has happened to him now I don't know."

"Q. Did you say you were present at the second operation?"

"A. Yes, sir."

"Q. And you assisted in that in the same general way that you did in the first one?"

"A. That is right."

"Q. May a hydroma of this character exist for some considerable period of time before symptoms begin to manifest themselves?"

"Mr. Waitkus: Will you be a little more specific? What amount of time, Mr. Hackbert?"

"Q. Well, might a hydroma of this character develop slowly over a period of years?"

"Mr. Waitkus: How many years?"

"Q. Before symptoms begin to manifest themselves?"

"A. I suppose that anything can happen, but usually within a period of two months symptoms begin to manifest, although—"

398 "Q. You mean two months within the inception of the—"

"A. That is right, but patients have been known to probably go a period of one or two years before definite symptoms brought them to the doctor."

"Q. What is the difference between this type of a situation and its slow development, and the type of cerebral hemorrhage that we laymen hear about, in which paralysis follows very promptly?"

"A. The hemorrhage in the latter instance is due to hemorrhage within the brain substance itself."

"Q. And caused the damage or the pressure within the brain?"

"A. Within the brain."

"Q. From the onset of the hemorrhage?"

"A. That is right."

"Q. And in the case of a hydroma such as this, it causes a growth of this sac within the coverings of the brain, and not until that has grown to a point of exerting pressure on the brain will symptoms manifest themselves?"

"A. That is right, but it can cause pressure without causing symptoms, but it can't cause symptoms without causing pressure."

399 "Q. I see. Do I take it from that last answer that there is some elasticity, is the best word I can think of, within the cranial area that permits a certain amount of pressure to be built up before there is any interference with the functioning of the brain and the nervous system?"

"A. There is a certain ability of the brain itself to withstand pressure exerted over a long period of time. For instance, a growth this thick (illustrating) can cause immediate death in a period of a couple of hours."

"Q. Quarter of an inch?"

"A. Quarter of an inch, yes, if it comes on within twenty minutes, but over a period of years you can have it about this thick, see (illustrating)—about six centimeters."

"Mr. Waitkus: Did you say a tumor?"

"A. A growth or a tumor. It can be quite large."

"Q. May there be brain tumors in this same area of the brain?"

"A. Brain tumors can occur. In other places?"

"Q. Yes."

"A. Yes."

"Q. So far as symptoms they produce are concerned, are they substantially the same as symptoms in this 400 man's case?"

"A. Yes."

"Q. In other words, so far as symptoms are concerned, it might be a fluid containing a sac or a firm job, such as a growth?"

"A. In other words, there is a history of a relatively progressive disfunctioning of the left side of the brain over a period of time. It can be the result of a brain tumor as well."

"Q. Would this hydroma manifest itself in symptoms other than a disfunctioning of the extremities? In other words, would it have any effect upon the man's general feeling of well-being?"

"A. Yes."
"Q. Would it manifest itself in headaches?"
"A. Yes, oftentimes."
"Q. And what is the timing of those various things such as headaches or general feeling of ill-being with respect to the appearance of loss of function of the extremities?"
"A. Usually occur before or with."
"Q. So that the appearance of the partial paralysis is one of the later appearing symptoms?"
"A. Yes."
401 "Q. And a general feeling of—"
"A. Irritability."
"Q. —irritability and not feeling well might be one of the very first symptoms?"
"A. That is right, and that is why people go along for a long time without having them recognized. They feel fine."
"Q. That is why, is it, Doctor, those conditions may be present and may slowly be developing and then there will occur a single specific instance or a single specific occurrence, and the individual, thinking back, is likely to be deceived from that?"
"A. Right."
"Q. Rather than to remember how long the general symptoms of ill-being have been present?"
"A. Right."
"Mr. Hackbert: That is all, Doctor."

"Redirect Examination by Mr. Waitkus."

"Q. When you talk about the general feeling of ill-being, Doctor, that is one of the earlier symptoms?"
"A. Yes."
402 "Q. Or would you say later symptoms?"
"A. That is usually one of the early symptoms. Of course, that is just one of the symptoms. It may be a feeling you can have because of pressure—disturbance of the frontal lobe."
"Q. Would irritability be one of the symptoms?"
"A. Could be, yes."
"Q. Or confusion, would that be one of the symptoms?"
"A. Yes."
"Q. Doctor, you said in answer to one of Mr. Hack-

bert's questions that, when the pressure was removed—when this hydroma was removed, that the pressure was removed on the brain, but that Mr. Gibson still had partial paralysis?"

"A. Right."

"Q. Can you explain why he still had partial paralysis?"

"A. Because of the operative note that there was an atrophy of the area of the brain and failure of development of that area of the brain."

"Q. Would atrophy—what does atrophy mean?"

"A. It means a shrinking."

"Q. Shrinking, or does it also mean—"

"A. Decreased area or substance."

403 "Q. Would it mean deadening of any of the tissue?"

"A. Yes."

"Q. And any foreign object in the brain, that would cause—"

"A. Yes, if present long enough."

"Q. And a hydroma is definitely a foreign object?"

"A. Yes."

"Q. And a subdural hydroma could cause atrophy to the brain?"

"A. Correct."

"Q. And atrophy to the brain is brain damage, is it not?"

"A. Right."

"Q. You also mentioned that brain sizes were different, or words to that effect, as I recall. Is there such a thing as a normal brain size? I mean what is normal for me might not be normal for you. Is that true, Doctor, or not?"

"A. Well, the brain usually fits closely within the skull."

"Q. You mean skull of the individual?"

"A. That is right. As the brain grows, the skull grows right with it."

"Q. And skulls may be caused as a result of the

404 birth of the youngster, is that true?"

"A. Skulls asymmetry?"

"Q. Yes."

"A. Yes."

"Q. And it would be rather unusual, would it not, Doctor, to say that individuals are symmetrical as far as the face or skull is concerned?"

"A. That is right."

"Q. In other words, it is normal to say that one side of our face is a little bit different from the other side?"

"A. Right."

"Q. And one side of our skull is different from the other side?"

"A. That is right. In this case, there isn't as much difference in the normal person. This is more than just the usual normal asymmetry. It isn't very marked even at that. It is very slight. It is just minor asymmetry, and it is found in many individuals without symptoms."

"Q. In other words, without any symptoms?"

"A. That is right."

"Q. That might be normal for him, isn't that true, Doctor?"

"A. Yes."

405 "Q. In other words, as far as the brain and the brain covering and the liquid that is up in the brain, the entire skull is always filled, isn't that true, Doctor?"

"A. Right."

"Q. The fact Mr. Hackbert talked about this abnormal space, I just want to get that clear. There is no such thing as a pocket in there? I mean in the skull."

"A. That is right."

"Q. In other words, it is filled at all times?"

"A. Yes."

"Q. And this abnormal space that he was talking about might be normal for him—for that individual?"

"A. No. The abnormal space that this man had is a space which is potentially present in everybody—every normal person."

"Q. Every normal person?"

"A. But it isn't filled with anything. It is a potential space. I mean its membranes lay usually together and, you put something between them, it spreads the membranes apart, and fluid does not absorb in that area like it does in the arachnoid space where it absorbs the fluid that 406 is present in it. Normally, this fluid circulates freely in your heart and lungs and lymphs, in your tissues; circulates, and it gets back into the spine."

"Q. In this situation here, the man had this abnormal space and went along for years—say ten or fifteen years—without any kind of manifestation of brain damage?"

"A. To my knowledge, he exhibited no evidence of

brain damage until approximately one year before admission to the hospital."

"Q. That was when this subdural hydroma appeared, or the inception of it?"

"A. That is when he began to develop symptoms, and I have no idea when the subdural hydroma began."

"Q. But the symptoms first occurred and the subdural hydroma subsequently appeared?"

"A. I have no way of saying whether the symptoms occurred with the formation of the subdural hydroma or that the subdural hydroma which we saw in the operation could have been the cause and probably was the cause of this man's symptoms."

"Q. One more thing, Doctor. Some of these early reports of the hospital or records Mr. Hackbert read about the meeting with Dr. Rasmussen and Hoffman and
407 Ralston and speaking about his condition, that was before the operation, isn't that true?"

"A. No."

"Q. Well, let me refer you to E-74. Does that—was that certificate given based on Mr. Gibson's condition and what was done for him and the prognosis for the future?"

Mr. Hackbert: I interrupted, "That is dated July 15th, 1953, Mr. Waitkus. That is obviously—"

"Witness: Some time after that."

Mr. Hackbert: I said, "Long after the operation."

"Q. It is after the operation, yes, but I am saying, is that substantially correct? That was taken from the hospital records?"

Mr. Hackbert: I said, "I object to that. I don't think he could answer unless he prepared the certificate, unless he knows what it was prepared from."

Let me say, by way of explanation to the Court, that this testimony refers to the certificate which appears in the hospital record as being apparently a copy of a
408 communication mailed by the hospital to the United States Railroad Retirement Board

The Court: Does he attempt to answer it?

Mr. Hackbert: Well, he attempts to answer it by comparing this with early portions of the record.

The Court: Are you insisting on it?

Mr. Waitkus: I don't think it makes any difference, your Honor.

The Court: I will sustain the objection.

Don't answer it.

"Q. And, as a matter of fact, Doctor, originally when the man was first brought in, there was an impression that he might have a brain tumor, is that right?"

"A. Yes."

"Q. And, after the tests and the examination and the operation, it was agreed that he had a subdural hydroma, is that right?"

"A. Yes. Upon the basis of the possibility the brain tumor is by far more frequent."

"Q. But, when you got into it, after the tests and examination and the operation, then it definitely was established it was a subdural hydroma?"

409 "A. That is right."

Mr. Waitkus: That is all.

The Court: I suppose we shouldn't go any further.

Mr. Hackbert: I think it has been pretty heavy going.

Mr. Waitkus: It is awfully heavy stuff.

The Court: As I told you yesterday, ladies and gentlemen, we will have to suspend until Monday. Ordinarily we would go right on, but we can't, so we will have to start Monday morning. I haven't yet consulted with counsel as to when we might be able to get through next week. I am going to have a conference immediately after you leave your seats to see how much more evidence there will be. In any event, we will have to suspend now until Monday morning.

I would like to urge you to do two things. One, of course, is to observe all of the admonitions that I gave you Monday, and particularly not to talk about the case.

Sometimes, of course, there is a temptation to talk
410 about it at home. You should not, and I think you recognize that you ought not, subject yourselves to influences, even though they come from your family, because those are observations that might have some influence on you later on. So I ask that you not discuss the case with anyone, and also that you try to keep all of the evidence that you have heard in mind. As time goes on, we all know that things get dimmer in our memory. That is one of the reasons why we don't like to take an adjournment of this kind. But I would like to urge you to try to retain all of the evidence in your mind that you have heard up to now, and keep free of any conclusion until you have heard all of the evidence, the plaintiff's evidence and the defendant's evidence.

So with that in mind we will take an adjournment until ten o'clock Monday morning.

(And thereupon a recess was taken until Monday morning, September 26, 1955, at ten o'clock.)

411 And on Monday morning, September 26, 1955, at ten o'clock, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

LOIS M. GIBSON, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. Will you state your name to the Court and jury, please?

A. Lois M. Gibson.

Q. You are the wife of the plaintiff, Clairon Vern Gibson?

A. I am.

Q. When were you married to Mr. Gibson?

A. In February, 1939.

Q. Do you have any children by that marriage?

A. We have two.

Q. Is that your first marriage?

A. No, that is my second marriage.

Q. What was Mr. Gibson's health prior to coming to Gary?

412 A. His health was very good.

Q. When did Mr. Gibson first come to Gary?

A. He came to Gary in June, of 1950.

Q. Did the family come with him at the time?

A. No; we came in August, of 1950. We had to sell our home before we could move here.

Q. What did Mr. Gibson do when he first came to Gary?

A. We were moving the mineral business back here, so he rented this location behind Dr. Hackett and Dr. Smith for that purpose. Not having a health food store in Gary, we decided to add that to the line.

Q. Do you still have that health food store?
A. Yes, I do.
Q. Who operates it at this time?
A. I do myself.
Q. Is it a large store?
A. No; it is a little hole in the wall, you might say.
Q. What sort of foods and things do you sell there?
A. Well, we handle vitamins and minerals; we have allergy foods for those people who cannot handle wheat or rye; we have salt-free foods for people suffering
413 from heart disease; we have diabetic foods; and normal food, like one hundred per cent whole wheat flour, that fit in the health food line.
Q. Did Mr. Gibson work in the store until he went to work for the E. J. & E.?
A. Yes, he did.
Q. Do you recall when he started to work for the E. J. & E.?
A. He went to work for it about the middle of February, of 1951.
Q. At the time that he went to work for the E. J. & E., can you tell us whether he had any trouble with his walk of any kind?
A. No; it was always a standard joke with us when we would go down the street that I had to run to keep up with him. Nowadays the joke is that he has to try to run to keep up with me.
Q. Mrs. Gibson, when your husband started working for the "J," he started as a timekeeper; is that right?
A. That's right.
Q. Do you recall when he was transferred to building 100 as timekeeper?
A. I wouldn't remember definitely. I would say it
414 was shortly—
The Court: Isn't this cumulative?
Mr. Waitkus: Yes, it is; that is true, your Honor.

By Mr. Waitkus:

Q. I will refer you to the first payroll period in December, of 1951. I think it has been stated here that it was December 12, 1951. Do you recall that evening when Mr. Gibson returned from work?
A. Yes.
Q. Can you describe his appearance to us?

A. When he came in the door, he did have a definite dazed look. I asked him what was wrong.

Mr. Hackbert: I think I will object to the conversation.

The Court: Anything he may have said is objectionable.

By Mr. Waitkus:

Q. Just describe his appearance.

The Court: Not what he said, or what he told you as to how he felt or what happened. That would not be proper testimony.

A. All right. He did have a dazed look. His clothes were very dirty.

415 By Mr. Waitkus:

Q. Can you describe what you mean by his clothes being dirty?

A. Well, on his trousers, around the cuffs of them and on the legs of them there seemed to be a grease or something at least foreign there to what his clothes normally were.

Q. What in particular called your attention to that?

A. The fact that he stated at the time that he had bumped his head.

Mr. Peters: I move to strike that out.

The Court: Overruled.

By Mr. Waitkus:

Q. As far as you were concerned, was there anything said by you with regard to his clothing?

A. I asked him—

Mr. Hackbert: I object to conversation.

The Court: In the first place, if he said what happened, that is hearsay. And if it has to do with her views, at least as far as this lawsuit is concerned, they are not material. So, in either event, it is objectionable.

416 Mr. Waitkus: I will withdraw the question, your Honor.

By Mr. Waitkus:

Q. Do you recall any particular trouser-leg that had this dirt that you refer to on it?

A. No, I don't believe my memory could be that good.

Q. Can you describe this dirt that you refer to, as to what it consisted of, if you can tell us?

A. Well it was a greasy substance, and it was down the front of the leg, that I do remember. I would say it

was probably the left leg, and I wouldn't even swear to that.

Q. Do you recall whether he complained of any type of pain?

Mr. Hackbert: I object to that, if the Court please.

Mr. Waitkus: Withdraw that, your Honor.

By Mr. Waitkus:

Q. After this evening of December 12, 1951, Mrs. Gibson, can you describe his physical behavior to us?

A. I remember sometime between Christmas and around the first part of the year that there was a noticeable
417 change in Vern. He was irritable, for one thing. There would be times you could talk to him and he would answer, and other times he seemed not to know you were in the room talking to him.

Q. Can you tell us whether you noticed anything in his walk subsequent to that time?

A. Not at that time, no.

Q. Well, any time in 1952?

A. In February, of 1952, it was the latter part, that he was dragging his foot when he was walking across our hardwood floors, and I made the remark, "Vern, pick up your feet," and he said, "Lois, I can't." It would only be for a few days, and then he seemed to be all right again.

Q. And did that condition improve?

A. No; it began to get worse, but it was very slow.

Q. Now, Mrs. Gibson, you heard testimony here that one of your adding machines was being used when he was on the job as timekeeper in shanty 100. When did Mr. Gibson start using that adding machine?

A. Oh, he was using that adding machine back in the early part of the summer of 1951. The adding machine was there for either one of us to use, and he would
418 take it on his payroll period. The payroll periods in summers were much heavier than they were later in the fall. There was a larger group of men working.

Q. He would bring the adding machine back after—

A. After he was finished, he would bring it back to the store.

Q. Do you know whether or not he would ever bring any of his payrolls home?

A. Yes, Vern would bring his payrolls home two and three times out of each pay period. In fact, he would

bring the payrolls home and print the names in before the manhours were ever figured on the payroll. Many a night he worked until two in the morning on those payrolls.

Q. Now, did Mr. Gibson continue working in building 100?

The Court: Hasn't that been gone over?

Mr. Waitkus: Your Honor, I don't know that we have shown, it may have been mentioned in passing, but in the summer of '52 he was transferred into the Gary Mill, Gary Works, so that he didn't have to get out in the field as he did when he was at shanty 100.

419 Mr. Hackbert: She wouldn't know that, of her own knowledge, anyway.

Mr. Waitkus: I don't recall; I think he mentioned that he was transferred.

By Mr. Waitkus:

Q. Can you tell us when Mr. Gibson started to seek medication and a doctor's help?

A. Yes, he was going to a doctor, I know, in June; and I believe he was going to Dr. Radeff in May. That was the month my daughter was married, and I believe he was going to a doctor then.

Q. Subsequently, did he go to any other doctors?

A. He went to Dr. Behn until about August, and I myself called Dr. Behn up because I was not happy the way things were going; and Dr. Behn asked me over the telephone what I even thought it was, that he didn't know, and I told Dr. Behn—

Mr. Hackbert: I object to this.

The Court: Sustained.

By Mr. Waitkus:

Q. From there he went to Dr. Lewis?

A. From there he went to Dr. Lewis.

Q. And Dr. Lewis referred him to Billings Hospital?

420 A. Right.

Q. Did you take Mr. Gibson in to Billings Hospital?

A. Yes.

Q. And can you tell us, at the time you took him in to Billings Hospital, whether his condition was worse than it is now, or was it better?

A. I would say today Vern is no better than he was then.

Q. Were you present at the time they operated on him?
A. I was there in the hospital.
Q. You were there all during the time that he was operated on?
A. That's right.
Q. Do you know who operated on him?
A. Dr. Hoffman.
The Court: Hasn't that been gone into? The record would show that.
Mr. Waitkus: I believe the record will, your Honor.

By Mr. Waitkus:

Q. Can you tell us, as far as Mr. Gibson is concerned, whether he is able to get around as well as he did prior to the time that he started limping?
421 Mr. Hackbert: I object to that. It calls for a conclusion and comparison of two different times.
The Court: I think it is objectionable.
Mr. Waitkus: Withdraw that.

By Mr. Waitkus:

Q. Can you tell us whether Mr. Gibson complains of any particular pains at this time?
Mr. Hackbert: I object to that. That would be hearsay.
The Court: Well, whether he complains, as to what he says about it, I think that is objectionable.
By Mr. Waitkus:
Q. Can you tell us whether you have observed any evidence of pain at any time since Mr. Gibson's return from the hospital?
A. Vern has quite a number of headaches even yet.
Mr. Hackbert: I move to strike that out. That is not responsive to the question.
The Court: I think it is objectionable and should be struck because I don't believe one person can tell whether another person has a headache.
422 Mr. Waitkus: What I am referring to is whether or not she has noticed any evidence of any type of pain.
The Court: What he does. If you can say he has headaches by the way he looks or what he does, you can testify as to that.
The Witness: I would say he has headaches. He has the habit, when he has headaches, of rubbing up and down

here and going across his eyes, invariably. I will say, "What is the matter?" He will say, "My head is aching." His own indications are there.

By Mr. Waitkus:

Q. Is Vern able to do any work about the house?

A. No.

Q. I guess that has been gone into, about the abscess this summer.

Did you keep track of the doctor bills, Mrs. Gibson, paid out for Mr. Gibson?

A. Yes, I have.

Q. Do you have the amount that you paid out to Billings Hospital?

A. Yes, I paid Billings $1,063 for the hospital and $225 for the professional.

423 Q. Who is the professional?

A. That would be to Dr. Hoffman.

Q. Can you tell us what you paid to Dr. Behn?

A. I paid Dr. Behn around $70.

Q. And how much did you pay Dr. Lewis?

A. I paid Dr. Lewis $40, and also $10 to Dr. Robert L. Young at Dr. Lewis's request for that examination.

Q. It was testified that Dr. Nelius performed an operation on the abscess this summer. What was his bill?

A. Dr. Nelius' bill was $1.35—

Q. $1.35?

A. $135.00 for professional care in hospital. The hospital bill was $278. And then there were all of the office calls, which he hasn't billed me for as yet.

Q. Did you attempt to get Dr. Nelius to come here?

A. I called Dr. Nelius, and he was in the hospital.

Q. You mean he was ill himself?

A. That's right.

Mr. Waitkus: You may cross-examine.

424 *Cross-Examination by Mr. Hackbert.*

Q. Mrs. Gibson, the manner in which Mr. Gibson got into this mineral business was by reason of taking these mineral pills himself, was it not?

A. That's right.

Q. For how long a period of time prior to the time he came to Gary was it that he had been taking those mineral pills?

A. Three years.

Q. Was he still taking them at the time he came to Gary?

A. He was, and still is.

Q. He has been taking them, then, for a period of the past eight years?

A. That's right.

Q. What was the condition which led him to start taking mineral pills eight years ago?

A. A run-down condition resulting from a strep throat.

Q. When you say a "run-down" condition, what do you mean?

A. Well, when your blood pressure drops low you have an inclination of having to drive yourself. That
425 is one definite indication. His blood pressure was low, and in taking the mineral pills it did seem to build it up.

Q. Did it kind of pick up his spirits?

A. His spirits were all right.

Q. Well, did it pick up his ability to get around and do things?

A. Yes, it gave that extra drive that he needed.

Q. For how long a period of time prior to the time he started taking mineral pills did he have those symptoms of kind of not being up to par?

A. Well he had this strep throat when we actually had the restaurant, and I took over on that while he was ill and recuperating.

Q. How long was he ill?

A. He was ill about a month or so.

Q. When was that, approximately?

A. That would have been in, I would say, about '46.

Q. Then after he gave up the restaurant business, what did he do?

A. Then he maintained his parking lot, and we took a long vacation. In fact, I guess he took the mineral pills while we were on that vacation.

Q. In addition to the minerals, what other medica-
426 tion had he been taking?

A. Nothing.

Q. After you came to Gary, before he went to work for the E. J. & E., was he taking any other medications or products that you handled in your store other than these minerals?

A. No; Vern wasn't taking anything other than the minerals. He was interested in the vitamins, but he didn't go into those actually until his condition showed up, and then he did go on the vitamins.

Q. When you say his condition showed up, what do you mean?

A. After this accident happened and he first began to show this sluggishness, then I put him on vitamins myself.

Q. What other medications does he take other than the minerals and vitamins at the present time?

A. That is all.

Q. Do you recall an incident when he fell at work in the spring of 1951?

A. I do.

Q. And about when was that?

A. That would have been approximately in March.

Q. What do you recall about his appearance at that
427 time?

A. Well, once again, his clothes were dirty, his shoes particularly. I always objected to those; he paid $23 for shoes, and they were plenty beat up after a few weeks wear out there.

Q. As a matter of fact, when he had to get out on the job and check these crews in the field during the winter weather, his clothes would tend to get pretty dirty, wouldn't they?

A. That's right. In fact, in my washing machine, it was always loaded with little rocks from his trousers.

Q. And there wasn't anything unusual about that circumstance that night that he came home looking a little bit dazed?

A. His clothes were in much worse condition than normal.

Q. What, if anything, did you observe about the location of any of this dirt on his clothes?

A. The only thing that I could say that I observed was the fact that there was this streak of grease on his clothes, or whatever that was.

Q. You don't know what it was?

A. I don't know what it was. I am not familiar
428 with railroads that much.

Q. What kind of clothes was he wearing that night?

A. Khaki trousers.

Q. What color were they, brown?

A. A light tan.

Q. And this spot that you speak of was on the front of the trouser-leg?

A. Yes.

Q. About how high up on the leg?

A. Just below the knee.

Q. How did you get that spot out, if you did?

A. I had him change his clothes, put them down in the washer, put some chlorox in.

Q. Did that take it out?

A. It never did come out completely, no.

Q. The first time you noticed any change in his disposition was around the first of the year, you say?

A. Between Christmas and around the first of the year he was—he became very irritable.

Q. When was the first time he started going to a doctor?

A. He started going to a doctor, to my knowledge, sometime in May.

Q. What doctor was that?

429 A. That was Dr. Radeff.

Q. What kind of a doctor is he?

A. He is a chiropractor.

Q. How long did he continue going to a chiropractor?

A. He went to him until about June.

Q. Then how long was it before he went to any other doctor?

A. Well, he went directly from Dr. Radeff to Dr. Behn.

Q. And he continued with Dr. Behn until sometime in August?

A. That's right.

Q. Now, during the time that he was going to Dr. Radeff, what, if anything, did you notice about his physical condition?

A. Well, I couldn't see any improvement. He was becoming more irritable, actually getting into a number of arguments with the children at home, which, to Vern, that was a rarity.

Q. What did you notice about his ability to walk or his ability to use his right arm and hand at that time?

A. I didn't notice anything particularly on the hand.

430 I noticed definitely on the walk that it would be intermittent. Maybe for two or three days in a row he would be walking and the leg would be inclined to drag. Then he seemed to walk normally for a while. And then

all of a sudden I would notice it again. To me, I did not notice anything on the arm until August. That was when I became quite alarmed.

Q. You say that his condition today is about the same as it was when he came out of Billings Hospital?

A. No, I say that he is about the same as when he went into Billings Hospital. There was an improvement. The improvement—when he came out of Billings Hospital until about May, of '53, there seemed to be a slight improvement; in fact, Vern did not even have to use a cane then. It was not necessary at the time for him to be using this sling. He seemed to have a little bit more coordination than he has now.

Q. For how long a period of time prior to the time that he went into Billings Hospital was his condition about the same as it is now?

A. It was becoming quite acute from I would say August, about the middle of August, until he went into the hospital.

431 Q. Was he wearing this sling then?

A. No.

Q. Was he using a cane then?

A. No.

Q. But generally, so far as his ability to get around and use his right arm and hand, his condition now is about the same as it was in August and in September prior to the time he went into Billings Hospital?

A. Oh, I would say that his condition is worse now than it was then.

Q. How much worse is it, what difference is there?

A. Well, at that time he was still able to take a pencil and hold and grip in his hand. Vern can take a pencil, hold and grip for a short time now, and then he loses complete power.

Q. For how long does he lose power to hold the pencil?

A. Apparently for quite a while. He has learned to shift into his left hand, so that it would be hard for me to tell.

Q. Now he uses his left hand?

A. Most of the time he uses his left hand. He eats with his left hand.

432 Q. You say you went with him to Billings Hospital?

A. I did.

Q. Were you with him there at the time he talked to the internes and gave them the history, or were you away?

A. No; they took him upstairs; I was not allowed to go up.

Q. You were just there at the hospital, but you had no actual contact yourself with what was being done?

A. That's right.

Q. How do you remember this occasion of his coming home with a dazed look as having been on the 12th of December?

A. Well, for my part, I couldn't have told you what date, except that it was around the period of his payroll being in, but remembering back into the month part of it, that was the first Christmas that my daughter had been working and had her own money, so we were having a good time spending it.

Q. So that you remember it as having been sometime prior to Christmas?

A. That's right.

Q. Do you recall for sure whether it was the first
433 payroll period in December, or the last payroll period in November that this happened?

A. I would not definitely state.

Q. In other words, you would only be able to piece this together as you reflect back on the whole situation now?

A. That's right.

Q. There wasn't anything about that incident that night that particularly impressed itself on your mind then?

A. No; inasmuch as Vern wasn't complaining about a lot of headaches immediately afterwards, I am like, I guess, the average; I didn't pay too much attention to it.

Q. Other than these two accidents that we have spoken of, do you recall any other accidents that he has been involved in during the period of time that you have been married to him?

A. No accident that has caused injury to him.

Q. Well, what kind of accident are you referring to, qualifying it that way?

A. Well, when he was driving up to Bayview, Idaho, he was in an accident with his car, the sun blinding him,
434 early in the morning. Our car was not damaged, but the other car was; we took care of that. There was no personal injury of any kind.

Q. When was that?

A. That would have been about 1942.

Q. Was that a collision of two cars?

A. Sideswiping.
Q. Were you in the car at the time?
A. No. He had a group of men, taking them to work.
Q. Other than that, do you recall any other accidents?
A. No, I do not, not since I have been married to him.
Q. During this period of time that Mr. Gibson first started taking these vitamins, was he going regularly to some doctor for attention for this low blood pressure condition?
A. What are you referring to, back before 1951, or at that time?
Q. Back before 1951.
A. In 1951 he was going to Dr. Scott B. Wisner, in Seattle, Washington.
Q. That must have been 1950.
A. No, that would have been back in—prior to 1950; it would have been when we were in Seattle, when he
435 had the low blood pressure.
Q. How long had he been going to Dr. Wisner in Seattle prior to 1950 for medical attention?
A. Dr. Wisner was just a pal with us; I think we all went to him, to see him periodically, if nothing else.
Q. How often did your husband go to him?
A. I would say he went to him a couple of times a month.
Q. After he came to Gary, after you got here in August, of 1950, was he going to any doctors then?
A. No.
Q. When was the first time after he came to Gary that he went to a doctor?
A. The first time would have been when he went to Dr. Radeff, and then to Dr. Behn after that.
Q. Do you recall that during the period of time in December, and around Christmas time, that he was giving any indication to you that he was suffering from any headaches at that time?
A. Nothing more than his normal type of headaches that he would occasionally have.
Q. How often would he normally have these headaches?
436 A. Oh, he might come down with one or two a month. Vern had, oh, I guess like Dr. Wisner said, a kind of neuritis condition; it was not a headache; it was a form of neuritis.
Q. How long had he had that condition, that you know of?

A. Oh, he has had that from the time that we had the restaurant. The fact of the case, the last few years he had been much better from it.

Q. He would get the headaches two or three times a month, you say?

A. Possibly.

Q. How long would they last?

A. On, in four or five hours they would be gone.

Q. After December, of 1951, did he still continue to have those headaches?

A. Occasionally, yes.

Q. Was there any increase in their severity or in their frequency, so far as you were able to notice?

A. No, there was not.

Q. So that, so far as his headaches are concerned, that condition he had all during the time you have known him?

A. Yes, that's right.

437 Q. That hasn't changed?

A. That hasn't changed.

Mr. Hackbert: I think that is all.

Mr. Waitkus: Just one question.

Redirect Examination by Mr. Waitkus.

Q. Do I understand that these medical bills you spoke of have all been paid?

A. No; I have been bogged down with doctor bills, believe me. I owe Dr. Nelius completely; and I still owe Methodist Hospital money; and I still owe Dr. Behn money. I just completed paying the doctor bills on my girls, with polio. Thank heavens, I have those out of the way.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

Mr. Waitkus: At this time, your Honor, we want to read the interrogatories that were answered by the defendant.

The Court: How many are there?

Mr. Waitkus: About 40-some interrogatories.

438 The Court: Can you eliminate some of them?

Mr. Waitkus: I have eliminated many of these, your Honor. Most of these are short interrogatories and answers.

The Court: Any objection?

Mr. Hackbert: No objection.

The Court: Let me say to the jury this, that each side may propound or submit to the other side questions that have to do with the case and the other party has to answer them unless there is some legal objection which does not require them to do so. If they do answer them, then they may be admitted in evidence just the same as if they were evidence.

You may proceed. I would suggest, in view of the time situation, that you do it as rapidly as possible.

Mr. Waitkus: Yes, I will, your Honor.

Mr. Hackbert: Would you indicate the number?

Mr. Waitkus: Interrogatory No. 3: "Where was the defendant corporation incorporated?"

The Court: Well, is that important here before the jury?

Mr. Peters: It is immaterial.

439 The Court: It is not going to be a jury question as to where the corporation is incorporated. If you put it in evidence, that is one thing. If the jury wants to take the interrogatories and answers to the jury room and read those, that is all right, but you don't have to read them to the jury, unless you think it is essential.

Mr. Waitkus: May I say this, your Honor, there is one particularly that I would like to read.

The Court: That one, certainly, and if the jury wants to read—

Mr. Waitkus: They have indicated in their answer that they are incorporated in two different states.

The Court: Is the jury going to decide where they are incorporated?

Mr. Waitkus: I don't presume they will, your Honor.

The Court: It just takes time.

Mr. Waitkus: We will skip that, your Honor.

No. 11: "Is the defendant corporation engaged in interstate commerce between the State of Indiana and Illinois?"

The Court: Now, that is another thing. I am going 440 to tell them what these are; they can read them. I am going to tell them what the law questions are and the fact questions that they are going to decide.

Is the jury going to decide whether or not the E. J. & E. is engaged in interstate commerce?

Mr. Waitkus: Your Honor, by answer to the interrogatory the E. J. & E. admits that they are.

The Court: And I am going to tell the jury that they don't have to concern themselves with that question.

Mr. Waitkus: That is the purpose of reading the interrogatories.

The Court: You don't have to do that. If they are admitted in evidence, you can read them at a recess or some time, so that we can go ahead, or put them all in, if you want to, by number.

Mr. Waitkus: Okay; I can do that, then, your Honor.

Interrogatory No. 15: "Was the plaintiff given any physical examination before such employment?" Your answer was, "Yes."

Interrogatory No. 16: "What did such physical examination disclose?" Your answer, "Defective vision
441 in both eyes."

Interrogatory No. 17: "Was plaintiff able to perform his duties at the time he was employed?" Your answer, "Yes."

I will skip some of these, your Honor, that evidence has been put in on.

Interrogatory No. 53: "Referring to December 13, 1951, was there any doormat placed before the door in said building #100, on or prior to the date of Dec. 13, 1951?" Your answer is, "No."

Interrogatory No. 54: "Referring to the same date, was any foot scraper placed before the door of said Building #100?" Your answer, "No."

Interrogatory No. 68: "Did the defendant inspect the premises as to the amount of electric light for illumination in building #100?" Your answer, "Yes."

Interrogatory No. 69: "If so, when?" Answer, "Weekly."

Interrogatory No. 70: "How finally was such inspection made?" Your answer, "By electrician making weekly inspection."

Interrogatory No. 71. "When was the last time such inspection was made prior to December 13, 1951?"
442 Your answer, "Within previous 7 days."

Interrogatory No. 91: "What wages was the plaintiff receiving on Dec. 13, 1951?" Answer, "$14.2762 per day."

Interrogatory No. 92: "What was the average monthly wage this plaintiff received from the time he was employed until the time he was injured on December 13, 1951?" Answer, "$304.56."

Interrogatory No. 127: "Did the plaintiff make any reports of any derailments?" Answer, "Plaintiff would make reports of derailments from information given him by the supervisor or foreman."

Interrogatory No. 128: "Did the records disclose reports made by this plaintiff as timekeeper of any derailments?" Answer, "Without a search of all of its records, defendant is unable to state what reports of derailments were made by the plaintiff or when or how many."

Interrogatory No. 130: "Do the reports disclose reports made by the plaintiff as timekeeper, of any accidents?" Answer, "Plaintiff's duties included the making of reports on personal injury accidents, and presumably he made such reports."

Interrogatory No. 135: "Did the plaintiff make any
443 reports as to the repairing of any section of track?"
Answer, "The only report which plaintiff would make as to the repairing of any section of track would be a report of the material and labor used in connection with a derailment."

Those are the only ones I will read at this time, your Honor.

The Court: If there are others that you did not read to the jury but want to put in evidence, I would suggest that you state the number of the interrogatory and the answer and they will be included as part of the evidence. Do it now, without reading them to the jury.

Mr. Waitkus: Nos. 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16—

The Court: 15, 16, and 17 you read.

Mr. Waitkus: I am just giving them all to the reporter. 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 31, 35, 36, 43, 45, 53, 54, 55, 58, 59, 60, 61, 63, 68, 69, 70, 71, 87, 88, 91, 92, 93, 94, 108, 109, 115, 118, 127, 128, 130, 131, 135, and 139.

The Court: Those questions and answers will be considered a part of the evidence, and either party may
444 refer to them in the final argument, as they see fit.

If you feel that they are essential to the questions before the jury you may read them now, as you did the others.

(Said numbered interrogatories and the answers thereto not read to the jury but which were made a part of the evidence are as follows:)

Interrogatory No. 2: "What is the correct name of the defendant corporation?" Answer, "Elgin, Joliet and Eastern Railway Company."

Interrogatory No. 3: "Where was the defendant corporation incorporated?"

Interrogatory No. 7: "What business is the defendant corporation engaged in?"

Interrogatory No. 8: "If the defendant corporation is incorporated in more than one state, are all of the corporations managed by the same president, vice-president, secretary and treasurer?"

Interrogatory No. 9: "Where is the home office of the defendant corporation located?"

Interrogatory No. 10: "Is this home office the same for all defendant corporation's corporations, regardless of the state in which they are incorporated?"

445 Answer 3-10: "Defendant is a single, consolidated corporation, incorporated in Illinois on December 11, 1888 and in Indiana on February 15, 1889, as a common carrier by railroad, with its principal office at Chicago, Illinois."

Interrogatory No. 11: "Is the defendant corporation engaged in interstate commerce between the State of Indiana and Illinois?" Answer, "Yes".

Interrogatory No. 12: Does defendant corporation operate a railroad yard known as Kirk Yard in the City of Gary, Lake County, Indiana?" Answer, "Yes".

Interrogatory No. 13: "Has this plaintiff ever been employed by the defendant?" Answer, "Yes".

Interrogatory No. 14: "When was plaintiff so employed?" Answer, "On February 15, 1951."

Interrogatory No. 18: "Would the plaintiff have been employed by this defendant, if his examination disclosed any physical defect at any time?" Answer, "Perhaps, depending on the nature of the physical defect."

Interrogatory No. 19: "What were the plaintiff's duties at the time he was employed?" Answer, "Timekeeper for maintenance of way employees."

Interrogatory No. 20: "Were more men placed on
446 such timerolls subsequently, and while this plaintiff was timekeeper?" Answer, "Yes".

Interrogatory No. 21: "How many more men were placed on such timerolls, and when was that done?" Answer, "Several timekeepers and several hundred section laborers from time to time."

Interrogatory No. 22: "State whether or not that was the situation when the defendant started work on that

portion of the Kirk Yard track known as the hump." Answer, "Yes".

Interrogatory No. 26: "Was any interstate commerce handled by the Kirk Yard District of the defendant?" Answer, "Yes".

Interrogatory No. 27: "Did any of the trains coming through Gary Kirk Yard move in interstate commerce?" Answer, "Yes".

Interrogatory No. 28: "Did the defendant have or operate any repair yards, or repair shops or round house at Kirk Yard which took care of trains or equipment used in interstate commerce?" Answer, "Yes".

Interrogatory No. 29: "Where was this plaintiff assigned when he was employed by the defendant?" Answer, "Kirk Yard".

Interrogatory No. 31: "Was this plaintiff as-
447 signed to work out of what was known as supervisor's building #100 at Kirk Yard?" Answer, "Yes".

Interrogatory No. 35: "How many employees worked out of this building?" Answer, "Supervisor and 2 timekeepers; 3 Buildings and Bridges foremen."

Interrogatory No. 36: "Who were permitted to enter said building?" Answer, "Track foremen, Buildings and Bridges employees, new track men when hired for Kirk Yard."

Interrogatory No. 43: "What is the purpose of that portion of the track known as the hump?" Answer, "Retarder classification yard."

Interrogatory No. 45: "Were additional men hired to construct the hump?" Answer, "Yes".

Interrogatory No. 55: Describe the composition of the surface of the ground in and about the vicinity of building #100." Answer, "Cinders".

Interrogatory No. 58: "Were any adding machines furnished this plaintiff in his work, by the defendant corporation?" Answer, "No".

Interrogatory No. 59: "How many timekeepers or helpers assisted this plaintiff in work out of building #100 at the time the plaintiff was employed by the defendant?" Answer, "None".

448 Interrogatory No. 60: "How many timekeepers and helpers assisted this plaintiff in working out of building #100 on December 13, 1951?" Answer, "None".

Interrogatory No. 61: Did the timekeepers have to work

overtime to get the payroll sheets out on time?" Answer, "Sometimes".

Interrogatory No. 63: What do these time sheets show as to the amount of time worked at such times by this plaintiff?" Answer, "8:00 to 12:00 A.M.; 12:30 to 4:30 P.M. Overtime 5:30 to 8:00 P.M. December 12, 1951."

Interrogatory No. 87: "Were any records of plaintiff's activities while on the job or while he was performing his duties sent out of the State of Indiana?" Answer, "Yes".

Interrogatory No. 88: "Where are wage records pertaining to this plaintiff kept by the defendant?" Answer, "Chicago, Illinois".

Interrogatory No. 93: "Do the defendant's records disclose any absences of this plaintiff from his work after December 13, 1951?" Answer, "Yes".

Interrogatory No. 94: "If so, state when." Answer, "Beginning October 1, 1952."

449 Interrogatory No. 108: "What wages did this plaintiff receive at the time he was unable to perform his duties as timekeeper?" Answer, "Plaintiff received no wages from the defendant at any time when he was unable to perform his duties as timekeeper."

Interrogatory No. 109: "Give the amount of wages the plaintiff received for the period he was employed by the defendant corporation". Answer, "$7,300.96."

Interrogatory No. 115: "Did the plaintiff take any messages from the roadmaster?" Answer, "It was no part of plaintiff's regular duties to take messages from the roadmaster."

Interrogatory No. 118: "Has the defendant taken any photographs of the exterior or interior of the supervisor's or timekeepers' building #100 located at Kirk Yard after December 13, 1951?" Answer, "Defendant took two sets of photographs of the interior of timekeeper's building #100, one set on April 23, 1953 and one set at an undeterminable date."

Interrogatory No. 131: "Did the plaintiff make any
450 reports of any accident?" Answer, "Plaintiff's duties included the making of reports on personal injury accidents, and presumably he made such reports."

Interrogatory No. 139: "What were the duties of the supervisor who shared timekeepers' Building #100 with the plaintiff?" Answer, "Supervision of maintenance and repairs to tracks."

The Court: Those questions and answers will be considered a part of the evidence.

Mr. Waitkus: The two letters that were marked Plaintiff's Exhibit 9 and 10, is there any objection to those?

Mr. Hackbert: Let me just check on them. There is no objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBITS 9 and 10 were admitted in evidence.)

The Court: Do you need to read them, or can you tell the jury what they are, abstract them?

Mr. Waitkus: The one dated March 29, 1951, is a letter which was sent to all maintenance of way timekeepers. It told them how certain forms had to be filled out and prepared in the hiring of help. And particularly it sets
451 out the different people who received these notices. Mr. Gibson was one of them.

And then Plaintiff's Exhibit 10 is a letter to Mr. E. V. Paige, Acting Roadmaster, E. J. & E. Railway Company, Kirk Yard, Gary, Indiana. It refers to the meeting regarding the registering of these employees who would be brought in from the Chicago district, who would be brought in by bus, and it sets out the different acts that had to be performed in the hiring of these different fellows, and double-checking with them as to whether they had ever been working there before, or not, and setting out the different types of certificate which had to be prepared. This was signed by Mr. A. C. Hoyt, Engineer Maintenance of Way. Copies were sent to F. G. Campbell, S. H. Shepley, H. W. Gates, and R. V. Dangremond, with the note: "The Chief Clerk referred to above is, in all cases, the chief clerk of the Acting Roadmaster in Gary, Indiana.

"Mr. R. E. Loomis will be at the Acting Roadmaster's office starting Thursday, April 19, 1951 to supervise the initiation of this system, as long as is necessary.
452 "All Gary Division M of W Timekeepers—Please note and be governed accordingly."

This was sent to all of the timekeepers. It is dated April 17, 1951. It was sent from Joliet, Illinois.

I have prepared a short resume, your Honor, of all these hospital records, to which they have stipulated.

The Court: Has it been marked as an exhibit?

Mr. Waitkus: The hospital records are marked E1 to E75. I presume she can mark them in her leisure time, if

it is agreeable to you, mark the entire exhibit Plaintiff's Exhibit 12, and the sheets 1 to 75.

The Court: Is there any objection?

Mr. Hackbert: No, your Honor. It is stipulated that that is a photostatic copy of the hospital records. However, I think, for the purpose of the record, we ought to point out that there are three numbers missing, so that there isn't any suggestion that something has inadvertently been omitted here.

The Court: All right. In other words, both sides deem them to be non-essential?

Mr. Hackbert: We just did not get them.

453 Mr. Waitkus: We have both checked; both of ours are identical.

Mr. Hackbert: What is missing is E62—

The Court: Is that very important? There are three of them missing. You can give them to the reporter later.

Mr. Waitkus: There are three.

(The pages missing were E57, E60, and E62.

The respective sheets of the hospital record, Plaintiff's Exhibit 12, were marked 12-1 to 12-72, both inclusive.)

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 12, consisting of sheets marked 12-1 to 12-72 both inclusive, was admitted in evidence.)

Mr. Waitkus: This is a short resume of the hospital records E1 to E75.

Clairon Gibson, 312 Chase Street, Gary, Indiana, age 48, was admitted to the hospital September 30, 1952, and was discharged November 10, 1952. He was referred to the hospital by Dr. George Lewis, Gary, Indiana.

454 His history was that one year ago patient noted marked weakness of the right leg; six months ago, noted weakness of right hand; and three months ago, progressive difficulty with walking.

Reported severely bruised shins several years ago which have left discolored scars.

Hit head in railroad yard one year ago—almost lost consciousness.

After neurological tests, his condition was diagnosed as chronic left subdural hydroma, with associated cerebral atrophy.

On October 6, 1952, Dr. Hoffman performed a cranotomy, a left subtemporal exploration, and removal of bluish-gray

membranes, decompression of the area, draining off the fluid, and a plastic drain was inserted.

Between October 6 and October 22, 1952, patient developed infection from first operation, causing a subdural abscess.

On October 22, 1952, a second operation was performed. The old vertical incision in the temporal region on the left was reopened, the pus was irrigated out, and a new drain was reinserted. New medication, new dressings were applied.

Discharged from hospital on November 1, 1952. Prognosis good but improvement will be slow.

455 When last seen on 2-19-53, notes slight improvement in use of right arm and leg. Gait about the same—dragging and slight circumduction of right leg; strength and finger speed slightly better in right hand.

The Court: Let me say this to the jury: That is some of the information in these hospital records. You will have that complete hospital record there before you in your jury room and you can look at it and read any portions of it that you like.

And, also, I should say to Mr. Hackbert, if there are any other things that you want to call the jury's attention to, you may do so now or later in the case.

Mr. Hackbert: I think I will do it later.

Mr. Waitkus: We have also stipulated that these were the hospital bills, I believe.

(Said instruments were marked Plaintiff's Exhibit 13, for identification.)

Mr. Waitkus: These were stipulated to as being the bills at the time at Billings Hospital.

The Court: You have seen those, Mr. Hackbert?

Mr. Hackbert: I saw them at the pre-trial conference.

456 The Court: Are they the same?

Mr. Waitkus: Those are the same ones, the only ones we have.

Mr. Hackbert: No objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 13 was admitted in evidence.)

Mr. Waitkus: This is what Mrs. Gibson testified to.

The Court: All right.

Anything further?

Mr. Waitkus: I want to give the Mortality Tables, your Honor.

The Court: Is there any objection to the Mortality Tables?

Mr. Hackbert: Yes; I object to them, if the Court please.

The Court: You mean as to their admissibility?

Mr. Hackbert: As to their admissibility, under the issues in this case.

There is no evidence that this man has made any effort to work in the intervening period of time. He worked up until the time he went into the hospital, and his condition now, both the doctor and the wife say, is the same as
457 it was then. I think there is no foundation laid for the admission.

The Court: I will overrule the objection.

Mr. Hackbert: I object further on the ground that the figures in the life expectancy tables are those of life expectancy, rather than the normal work expectancy.

The Court: Well, I will say this, what is going to be admitted is the life expectancy of a person according to statistical records compiled by life insurance companies, I guess all of the life insurance companies together; anyway, it is a mortality table, so-called, which gives the life expectancy of a person at a certain age, whether a male or female. Now, this has to do—if you reach the question of whether or not Mr. Gibson was permanently injured, this has to do with the question of how long he might be able to work, if he were otherwise able to work, except for the injury.

You may consider, of course, the question that a person may not be able to work at various occupations right up to his total life expectancy; you should take that into consideration.

458 You may proceed.

Mr. Waitkus: This table is a mortality table showing the expectancy of life at various stages. It is the 1937 Standard Mortality Table showing that at the age of 48 a male's life expectancy is 26.35 years, and at the age of 51—which is now—it is 24.01 years.

And under the U. S. Tables compiled between 1939 and 1941, showing the life expectancy at various ages, it shows that, at age 48, the life expectancy, total male, would be 23.21 years, and at age 51, it would be 20.99 years.

I have one more, your Honor, which is the 1951 Table Compiled by the Statistical Bureau of the Metropolitan Life Insurance Company from the abridged life table prepared by the National Office of Vital Statistics, and it shows that at the age of 48 a male has a life expectancy of 24.6 years, and at the age of 51, 22.3 years.

The Court: Admitted.

Mr. Hackbert: You asked me for certain forms which he had.

Mr. Waitkus: Do you have the distribution form?

(Forms were handed to Mr. Waitkus by Mr. Hack-
459 bert, and were marked Plaintiff's Exhibits 14 and 15, for identification.)

Mr. Waitkus: I think, your Honor, this is the distribution form and the form for daily report. I would like to put them in the record, so that I can refer to them.

Mr. Hackbert: No objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBITS 14 and 15 were admitted in evidence.)

Mr. Hackbert: You also asked us to produce a copy of the report that he made or the report that was made of the accident in the spring.

(Said instrument was produced and was marked Plaintiff's Exhibit 16, for identification.)

Mr. Waitkus: Is there any objection to this going in evidence?

Mr. Hackbert: No.

Would you ask Mr. Gibson what part, if any, of that was filled out by him?

Mr. Waitkus: Was that filled out by you, Mr. Gibson?

460 The Plaintiff: I think the whole thing is my handwriting.

Mr. Hackbert: It is signed by J. Vitale, Foreman. Everything else on that was filled in by you; is that right?

The Plaintiff: Yes; it is all filled in by me with the exception of the foreman's signature.

The Court: What is it?

Mr. Waitkus: This, your Honor, is "Report of Personal Injuries to Employees" which is made in duplicate. The date of the accident is March 9, 1951, hour 4:20 P.M. Name of person injured, Clairon Vern Gibson.

The Court: It has to do with the time that he fell?

Mr. Waitkus: Yes.

"State nature and extent of injuries—Bruised shin bone on left leg & breaking skin in several places."

"What was done with and for injured person? Sent to hospital for treatment."

"State fully how accident occurred, what work was being done, what injured person was doing, signals given, etc. Injured was coming back to camp 140 after checking extra gang #2 when he stubbed his toe on end of
461 tie causing him to fall across track striking his left shin bone on rail."

"Was accident in any way due to tools or machinery being in bad order?" It says, "No."

The Court: All right; admitted.

(And thereupon PLAINTIFF'S EXHIBIT 16 was admitted in evidence.)

Mr. Waitkus: That is all. The plaintiff rests, your Honor.

The Court: We will take a short recess, ladies and gentlemen.

(A short recess was taken.)

The Court: Is there anything preliminary, before the jury comes in?

Mr. Hackbert: Yes, your Honor; I want to be heard on a motion for a directed verdict.

The Court: Do you have a written motion?

Mr. Hackbert: Yes.

The Court: What is it based on, the interstate commerce feature?

Mr. Hackbert: First, interstate commerce; second, on the question of no negligence—I have got cases which involve bumps on the head like this; and, third, on the proposition that there is no showing of any relation
462 of proximate cause between anything that the defendant did or could have done, anything that they relied upon here, and his bumping his head on the desk.

The Court: I would want to hear you, of course. The rules provide that the Court may reserve any questions. On the interstate commerce feature, rather than to take the time out now to go into that at great length, if the question can be reserved I think it would save time, particularly from the standpoint of the jury, for you to file the motion and go forward.

I will deny it with reservations.

Mr. Hackbert: I think we would save time by granting the motion.

The Court: At least, I have given this some thought. Of course, I want to hear you now or at an appropriate time on the other question, the negligence question. Again, it is a matter of time.

Mr. Hackbert: Well, I want to say this: I hadn't expected that we would move quite so fast. I have my witnesses notified to be here this noon, and expected to go ahead at one thirty. I could only put on some rather
463 formal proof now.

The Court: Some of these jurors are up against it, for one thing. A few of these matters perhaps can be argued at a time when the jury is not waiting. I think we ought to try to finish this case tomorrow night.

Mr. Hackbert: I think we can.

The Court: We won't, if we get into arguments.

Mr. Hackbert: It is almost 11:25. I had in mind that we would occupy the time between now and the ordinary hour of adjournment at noon with a discussion of the motion for directed verdict.

The Court: I want to hear you, of course. You say you have no witnesses now to go forward on?

Mr. Hackbert: The only witnesses I have to put on now would be to identify photographs and show them to the jury, and I have a couple of matters.

The Court: Could we do this, could we go ahead with the jury, with the statement from the Court to counsel that I will hear these formal matters, and then we will take up the argument during the noon hour?

Mr. Hackbert: That is all right.

464 The Court: It will save a little time. The jury can be eating while we are arguing.

Mr. Hackbert: Just so I get a chance to eat a little, too.

The Court: Let the record show that the motion for directed verdict at the close of plaintiff's evidence is filed, and that I am going to hear you on this as soon as we take an adjournment. As soon as the jury comes in, the defendant can go forward, as I understand it, with some more or less formal matters of defense.

Is that agreeable?

Mr. Hackbert: Yes.

(The jury came into the jury box.)

(And thereupon the defendant, to support and maintain the issues on its behalf, introduced the following evidence.)

Mr. Hackbert: If your Honor please, during the taking

of the deposition of Mr. Marjanian I had a small photograph marked for identification, and during his testimony here I had three other photographs marked. I now have enlargements of the small photographs. I would like to substitute the enlargements for Defendant's Exhibits
465 1 through 4, for identification.

The Court: Any objection?

Mr. Waitkus: No, your Honor.

The Court: They are identical, except they are larger?

Mr. Hackbert: Yes, your Honor.

The Court: Have they all been admitted?

Mr. Hackbert: No, they have not.

(Said enlarged photographs were thereupon marked Defendant's Exhibits 1, 2, 3, and 4, for identification.)

Mr. Hackbert: Mr. Cogswell, will you take the stand, please?

ARTHUR H. COGSWELL, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Hackbert.

Q. Will you state your name?

A. Arthur H. Cogswell.

Q. Where do you live, Mr. Cogswell?

A. Gary, Indiana.

Q. What is your occupation at the present time?

A. Safety inspector for the E. J. & E. Railway Company.

466 Q. In 1951 and early 1953, what was your position with the E. J. & E.?

A. I was division claim agent at that time.

Q. And for what territory?

A. For the Gary division.

Q. Is Kirk Yard included within the territory of the Gary division?

A. Yes, sir.

Q. In the course of your work as division claim agent, did you from time to time receive personal injury reports and reports of accidents?

A. Yes, sir.

Q. Was it part of your duty to make investigation of accidents?

A. Yes, sir.

Q. In the course of your duties as claim agent, have you had occasion to take pictures of localities?

A. Yes, sir.

Q. I show you what have been marked respectively Defendant's Exhibits 1, 2, 3, and 4, for identification, and I will ask you if those are photographs taken by you.

A. Yes, sir, they are.

Q. When were those photographs taken?

467 A. At some time in April, of 1953. I don't remember the exact date.

(An instrument was marked Defendant's Exhibit 5, for identification.)

Q. I show you a letter marked Defendant's Exhibit 5, signed by Mr. Justin Waitkus, dated December 5, 1952, addressed to the Elgin, Joliet & Eastern Railroad Company, to your attention. I will ask you if you received that letter on or about the date which it bears.

A. I received it on December 12th.

Q. 1952?

A. Right.

Q. Prior to the receipt of that letter, had you had any notification or report of any claim of Mr. Gibson of having been injured in the accident that is involved in this lawsuit?

A. This was my first knowledge. I take that back. This letter was received before December 12th. It was sent in to Chicago. I must have received it within a day or two after it was written.

Q. I see. Following receipt of that letter, these photographs were taken by you in April, of 1953; is that right?

A. That's right.

468 Q. Now, showing you first of all Defendant's Exhibit 1, will you tell us what is shown in that photograph?

A. There is shown the southwest corner of the so-called building 100, the inside.

Q. Mr. Cogswell, in the course of your work for the E. J. & E. in the year 1951, did you have occasion from time to time to go into this building 100?

A. Oh, I was in there occasionally, yes; maybe, I might say, every couple of months, something like that, if I was in that locality.

Q. And is the location of the desk with reference to the other furniture and portions of the room shown in that

exhibit the location of that desk as it was in December, of 1951?

A. Why, I believe it is substantially the same location.

Q. I show you what has been marked Defendant's Exhibit 2. Will you tell us what is shown in that picture?

A. That is the same side of the building, south side of the office building. The camera is facing more southeast than south. It shows the southeast corner of the office.

469 Q. Whose desk is that, that is shown in Defendant's Exhibit 2?

A. That is Mr. Schramm's, the supervisor's, desk.

Q. His desk backs up to the desk shown in the previous picture, Defendant's Exhibit 1?

A. The desk in the previous picture is the one that was Mr. Gibson's desk.

Q. I show you what has been marked Defendant's Exhibit 3. Will you tell us what is shown in that picture?

A. That is the northeast corner of the office, with the doorway leading into what is known as the Bridges and Building Department's office.

Q. That office is on the other side of the partition that is shown in that picture?

A. That is right.

Q. And does that picture correctly show the conditions as they were in the winter of 1951?

A. Substantially the same, yes, sir.

Q. I show you Defendant's Exhibit 4. Will you tell us what is shown in that picture?

A. That is the northwest corner of the office, and it is substantially the same as it was in December, 1951.

470 Q. And the door that is shown in the corner of that picture leads where?

A. That is the east door of the building, leading out, to the outside.

Mr. Hackbert: I offer the pictures in evidence, if the Court please.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBITS 1, 2, 3, and 4 were admitted in evidence.)

Mr. Hackbert: I would like to send them to the jury now.

The Court: All right. I wonder if you would scatter them around.

Mr. Hackbert: Yes.

North is this way. I thought I might try to start them the same way. This is northwest, this is southwest, this is northeast, and this is southeast.

(Said Defendant's Exhibits 1, 2, 3 and 4 were passed to the jury.)

By Mr. Hackbert: Q. When personal injury reports were made out by injured men or their supervisor for an accident at Kirk Yard in the years 1951 and 1952,
471 to whom could those reports come, in the first instance?

A. In the first instance, they would go to the head of the department in which the man worked.

Q. And from the head of the department then to whom?

A. To the division claim agent.

Q. In that case, that would be yourself?

A. That was it. That was particularly true in the maintenance of way department.

(An instrument was marked Defendant's Exhibit 6, for identification.)

Q. In the course of your investigation of this matter, Mr. Cogswell, after you received this letter of December 5th, did you also have occasion to make some measurements and a sketch of Mr. Gibson's desk and of its location in the building 100?

A. I did.

Q. I show you Defendant's Exhibit 6, and I will ask you if that is that sketch.

A. That is the sketch that I made on March 9, 1953.

Q. And are the measurements of the desk in the upper part of that sketch accurate?

A. They are.

472 Q. Does the diagram at the bottom of that sketch show the location of the desk with respect to the southwest corner of the building 100?

A. It does.

Q. The sketch in between is a rather rough sketch indicating the location of that building with reference to other buildings there in Kirk Yard, is it not?

A. That's right.

Q. That diagram in the middle doesn't purport to be a scale diagram?

A. No.

Mr. Hackbert: I offer this in evidence, if the Court please.

Mr. Waitkus: Mr. Cogswell, this sketch is not made according to scale, is that true, it is just a rough sketch?

The Witness: The desk and everything there is according to measurement; it has no scale to it. It shows what the dimensions are, and so forth.

Mr. Waitkus: It shows the dimensions of the desk, but, I mean, the desk and the chair and other things are not according to scale?

473 The Witness: It is not according to scale; it is according to measurement.

Mr. Waitkus: You just have the desks and the chair. The other equipment is not in it?

The Witness: That is correct.

Mr. Waitkus: We have no objection to it, your Honor, except to show that it is not according to scale.

The Court: He said it is not. Admitted.

(And thereupon DEFENDANT'S EXHIBIT 6 was admitted in evidence.)

The Court: Do you want to pass that around?

Mr. Hackbert: I don't think so, your Honor.

The Court: You can say what it is.

Mr. Hackbert: Just to show generally to the jury, the sketch at the top of Defendant's Exhibit 6 shows the desk, which is 54½ inches long, 20 inches wide, 29½ inches high.

The opening of the desk from the floor to the bottom 474 of the middle drawer is 24¾ inches, and the width of the opening is 23½ inches.

The bottom sketch shows the desk in relation to the corner wall, and shows it located 39 inches from the nearest corner of the desk to the west wall of the office building.

The sketch in the middle shows the building 100 located generally with reference to the location of the roundhouse, the main office and the annex building.

By Mr. Hackbert:

Q. Mr. Cogswell, subsequent to your receipt of this letter of December 5, 1952, did you take a question and answer statement from Mr. Gibson concerning the circumstances of this accident?

A. I did.

Q. Where was that statement taken?

A. In Mr. Waitkus's office.

Q. Do you recall when that was?

A. I do not.

Q. Did you subsequently see a copy of that statement, as it has been written up?

A. No, sir, I haven't seen it.

475 Q. Calling your attention to the date of January 13, 1953, would you say that the statement was taken about that time?

A. I would say it was somewhere in that time.

Q. Who was present at the time that the statement was taken?

A. Mr. Gibson, Mr. Waitkus, and myself.

Q. And by what means was the statement recorded?

A. By a recording machine.

Q. And will you tell us just generally how that machine works?

A. It is very similar to the one that the court reporter has on her desk here.

Q. And what means does it utilize for the recording, what is it recorded on?

A. Recorded on a disk.

Q. Much like the disks that are used here?

A. Very similar.

Q. After that recording had been taken, what was done with the record, if you know?

A. I sent it in to our main office, in Chicago.

Q. Have you had occasion to see that since, or to hear it played?

A. I have not.

476 Q. Was the recording played back at any time during the course of the taking of the statement?

A. It was played back immediately following the completion of the statement.

Q. And who were present at the time that it was played back?

A. Mr. Gibson, Mr. Waitkus, and myself.

Q. And what, if anything, was said by either of those gentlemen with reference to the accuracy or the completeness of the recording at the time that it was played back?

A. As I recall, every statement, I don't know about this one because I haven't had occasion to hear it since that time, but all statements are closed with whether or not the statement is substantially true and correct to the best of the knowledge of the injured man who was making it.

Q. With reference to the taking of this statement, was the machine continuously in operation during the time the questions were being asked and the answers were being given except for such time as it was necessary to turn the record over?

A. I don't know whether it was even turned over; I don't have any independent recollection of that. How-
477 ever, it would be a continuous movement, unless it had to be turned over.

Q. In the taking of these recorded statements, do you stop the record, as it is in process, and make any statements off the record, so to speak, or is it operating continuously?

A. I don't believe any statements were made off the record on this particular day at the time the recording was being made.

Q. Were there any omissions, to the best of your knowledge and recollection, kept off the record in the taking of this particular statement?

A. None to my recollection.

Mr. Hackbert: You may cross-examine.

Cross-Examination by Mr. Waitkus.

Q. Mr. Cogswell, did I understand you to say that you were division claim agent in 1951 and 1953?

A. That is correct, up until May, of '53.

Q. Were you claim agent in 1952, also?

A. Yes, sir.

Q. When did you cease to be the claim agent?

A. May 4th I believe was the last day, of '53.

478 Q. And were you then released from that job as claim agent?

A. I was sick for about nine months and I asked to be relieved, and I was given other duties.

Q. When you were claim agent, did you work on a salary?

A. Yes, sir.

Q. During the time that you were ill, were you paid your salary?

Mr. Hackbert: I object to that. That is not material here.

The Court: Objection sustained.

By Mr. Waitkus:

Q. You say you went back to work approximately nine months later?

A. It was nine months.

Q. Were you ill all that time?

A. I was unable to work in the capacity in which I had been accustomed to work.

Q. You say that you went back, and you are now safety inspector?

A. That is correct.

Q. Is that the capacity in which you went back, as safety inspector?

479 A. Yes, sir.

Q. You had no more connection with the claim department then?

A. That's right. I have had two or three cases that I have been in on, just like this one here, but no active duty.

Q. You don't do any claim work at all?

A. Absolutely not.

Q. How long had you been with the company as a claim agent?

A. I started with the E. J. & E. in April, of 1917, in the claim department, and I was in it until May, of 1953.

Q. I understand that you took these pictures that were identified here?

A. I took pictures, yes, sir, and I took these particular ones, too.

Q. Did you take any other pictures, in addition to these?

A. I took quite a few pictures. I believe I took two different sets of pictures. Mr. Waitkus; I am not certain, but I think I did.

Q. Well, do you recall when the other set was taken, whether it was taken before this set, or after this set,

480 that you showed here?

A. I couldn't tell you which is which, but I rather think that this is the second set of pictures I took.

Q. Do you happen to have the first set of pictures that you took?

A. Oh, I don't have any of them, no.

Q. Do you know whether Mr. Hackbert has the set?

A. I don't know; I couldn't tell you.

Mr. Hackbert: Just let me state, I don't know what became of the first set of pictures. The first recollection

I have that there have been two sets of pictures taken was in connection with one of the interrogatories that you either read or identified this morning.

By Mr. Waitkus:

Q. One of the answers of the company to the interrogatories said there were two different sets taken. You do recall having taken another set in addition to these that were shown this morning?

A. I am almost sure I took two sets of pictures in this particular instance.

Q. Do you recall whether the first set of pictures
481 you took showed a lot of dirt and grease stains behind this desk?

A. I don't remember any dirt or grease stains being behind the desk, but as my recollection is right now there was something on the floor in the front part of the picture or, in other words, to the side of the desk, it would be, and in the second set of pictures those marks do not show.

Q. Mr. Cogswell, you say you had occasion to go into building number 100 at different times?

A. It would vary; I wouldn't say positively just when I would go in or out; but whenever I was in that vicinity I might go in there and use the telephone, or something of that type.

Q. Isn't it a fact that you also checked with Mr. Gibson, if necessary, on accidents that may have occurred in Kirk Yard?

A. Oh, I doubt that very much. I might call him on something, ask him if he had a report on a certain man that had been hurt, or something of that kind, if I hadn't got the report soon enough.

Q. Then you would have to get that information from Mr. Gibson?

A. That's right, yes.

482 Q. Do you recall whether there was any type of door mat or foot scraper?

The Court: You have admitted that there wasn't any.

Mr. Waitkus: Well, the answer to the interrogatory admits it, your Honor, but one of the answers says that they deny the allegation that they did not have any.

Mr. Peters: That we negligently failed to supply.

The Court: It is admitted that they did not have; I think it is established.

By Mr. Waitkus:

Q. You are still working for the E. J. & E., are you not?

A. I am.

Q. Working out of Kirk Yard?

A. I am assigned to the Gary Mill division, which is adjacent to Kirk Yard.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

The Court: We will take a noon adjournment, ladies and gentlemen. I think we are getting along all right
483 as far as time is concerned. We are trying to work out a time schedule which will permit this case to be finished tomorrow, I want to let you know that, so we will try to keep that schedule this afternoon.

We will take an adjournment until one thirty this afternoon.

(And thereupon a recess was taken until one thirty o'clock in the afternoon.)

And at one thirty o'clock in the afternoon of said day, Monday, September 26, 1955, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: Ladies and gentlemen of the jury, counsel have informed me that there is not a great amount of additional evidence that will be submitted to you. Counsel for the defendant have informed me that they will have not more than half an hour of evidence to submit, but that they are not prepared to go forward with that
484 evidence this afternoon. I have conferred with counsel for the plaintiff and the defendant with regard to going forward today, or what we should do because of that situation, and it seems that the only thing we can do, because the evidence that the defendant proposes to submit is not available, even though it be very short, is to adjourn until tomorrow, and we well continue the case tomorrow morning at ten o'clock. That is the best we can do, but at least, as far as evidence is concerned, you have heard all of it except for about half an hour's evidence in the morning.

I would like again to ask you to keep in mind all of the admonitions that I gave you earlier in the trial.

We will adjourn until ten o'clock tomorrow morning, and we will finish the case tomorrow.

(The jury left the courtroom.)

The Court: In ruling on the motion for a directed verdict, I think that the court reporter took my ruling, but it is overruled with the reservation that the Civil Rules of Civil Procedure provide, and, also, I am going to reexamine the questions as presented in the motion overnight. If
485 there is any different ruling than I indicated on the record, it will be made in the morning.

But on that point there are two allegations in the complaint that I will say to counsel now will be withdrawn from the consideration of the jury, because I feel that the evidence is insufficient to submit them to the jury as elements of negligence.

Do you have in mind the paragraphs?

Mr. Hackbert: They are not really set out in separate paragraphs.

The Court: One is with regard to the necessity or the duty of the defendant to have sufficient or additional timekeepers.

Mr. Peters: That is part (7) of rhetorical paragraph 27.

The Court: And the failure to have a sufficient work force.

And the other allegation of negligence has to do with the use of borrowed adding machines.

Mr. Waitkus: (7) and (9).

Mr. Peters: Didn't your Honor indicate on the lighting—

The Court: No. I say now to counsel that those
486 two will not be submitted to the jury for their consideration as claims of negligence.

(And thereupon a recess was taken until Tuesday morning, September 27, 1955, at ten o'clock.)

And on Tuesday morning, September 27, 1955, at ten o'clock, said cause was resumed, pursuant to adjournment.

Present:

The same as before.

(The following proceedings were had out of the presence of the jury:)

A recording disk was played, containing the following statement:

"Mr. Gibson, I am Mr. Cogswell, the division claim agent of the E. J. & E. Railway Company, and we are in Mr. Waitkus's office at 569 Broadway, and it is about two o'clock in the afternoon of January 13, 1953. Also present with yourself and me is Mr. Waitkus.

Q. "Now, would you state your full name, Mr. Gibson?"

A. "Clairon Vern Gibson."

487 Q. "What is your age, Mr. Gibson?"

A. "Forty-eight."

Q. "Where do you live?"

A. "At 312 Chase Street."

Q. "Were you employed by the E. J. & E. Railroad Company?"

A. "Yes."

Q. "What was your occupation?"

A. "Timekeeper."

Q. "Did you have an account number while you were working?"

A. "No account number."

Q. "And what department were you in?"

A. "In the accounting division."

Q. "I see. And during what period were you so employed?"

A. "Between February 14, 1951, to September 30, 1952, when I went to the hospital."

Q. "I see. And during that period of time there was a time when you were supposed to have been injured; is that correct?"

A. "Yes, sir."

Q. "Do you remember the date of that accident, approximately."

488 A. "Approximately December 13th, of '52—'51, 1951."

Q. "In other words, about nine months before you left the service, is that correct?"

"And now, in your own words, would you tell me just exactly what occurred to you at that time?"

A. "Well, on December 13th, approximately December 13th, I was working overtime on the payrolls, and George Marjanian was working with me, in building 100 at Kirk Yard, in Gary, Indiana. We got our work approximately done, was cleaning up, and we had to borrow an adding machine that George asked me to put underneath my desk, so I shoved the adding machine underneath the desk, and when I backed out, I didn't back out far enough, and when I lifted up, I cracked my head upon the top of the desk drawer."

"I am going to play this back--

Mr. Waitkus: Just a minute; I want to hear the whole thing.

(Continuing playing of disk.)

"Now, I am going to play this back. If you want to add anything to it at that time, you can do so."

489 "Now, Mr. Gibson, you have heard this recording played back; is that correct?"

A. "Yes, sir."

Q. "Now, is there anything you want to add to this?"

A. "No, there is nothing I know of."

Mr. Hackbert: I don't know what Mr. Waitkus's objection is, but here is what we are proposing to read, the kind of statement in which Gibson identifies himself, and then he is asked the question, "Now, in your own words, will you tell us exactly what occurred to you at that time," and read the complete answer there. Then, skipping to the latter part of the record, we are proposing to read this:

Mr. Cogswell said, "Now, I am going to play this back. If you want to add anything to it at that time, you can do so."

"Now, Mr. Gibson, you have heard this recording played back; is that correct?"

A. "Yes, sir."

Q. "Now, is there anything you want to add to this?"

490 A. "No, there is nothing I know of."

Mr. Waitkus has some objection.

Mr. Waitkus: We object to the latter part, because the statement is presumably given for the purpose of impeach-

ing the witness when he was on the stand, when he was asked whether or not he made a certain statement. He said he didn't remember whether he made that statement.

This latter part is not going to the statement that was asked him on the stand. The only part he was asked was whether or not he made that statement, that he bumped his head.

Mr. Hackbert: If your Honor please—

Mr. Waitkus: This part has nothing to do with the statement that they attempted to impeach.

Mr. Hackbert: This man is not a witness, subject to the ordinary rules of impeachment; he is the plaintiff; and we can prove a statement against his interest without having confronted him with it on cross-examination.
491 I can prove any statement that is contrary to his testimony on the stand without confronting him with it.

The Court: As to whether he made that statement, or not?

Mr. Hackbert: That is right.

The Court: What about that?

Mr. Waitkus: Well, as far as the plaintiff is concerned, he was confronted with a certain statement, as to whether he made it, or not, and he said he didn't recall whether he did, or did not. At that time they could have confronted him with the additional statement that they had in there.

The Court: Well, I think that the latter part, regardless of what the rule may be as contended for—

Mr. Waitkus: It doesn't add anything to what he has already given, anyhow.

The Court: Well, but it does have to do with whether or not this is his statement.

Mr. Hackbert: Whether it is complete.

The Court: Whether it is complete. The only part of the question that I have in my mind is, unless the whole statement is read, I think at least the plaintiff would
492 have the right to have other parts read, if there are any.

Mr. Hackbert: I am perfectly willing to tender a copy of the statement, or let him play the whole thing.

The Court: Or make a statement that this is only part of the statement, that this is not the total statement.

I will overrule the objection, with that observation.

I would suggest that counsel inform the jury what he is

going to do, and I will charge counsel for the defendant to inform the jury that it is not the total statement. I will tell them if counsel for the plaintiff wants any additional statement read back, he may have it done.

Bring in the jury.

(And thereupon the jury came into the jury box.)

The Court: You may proceed.

ARTHUR H. COGSWELL, recalled as a witness on behalf of the defendant, having heretofore been duly
493 sworn, testified as follows:

Direct Examination by Mr. Hackbert.

Q. You are the same Arthur H. Cogswell who testified in this case yesterday?

A. I am.

Q. Mr. Cogswell, you have heard a recording played here in part this morning, prior to the coming in of the jury, long enough to identify the recording, have you?

A. I have.

(Said disk recording was marked Defendant's Exhibit 7. for identification.)

Q. And this recording, Defendant's Exhibit 7, will you tell us what you know about the making of this recording?

A. It was made in Mr. Waitkus's office in Gary subsequent to the date that I received a letter from him advising me of an accident to Mr. Gibson. I went to his office and asked him if I could talk to his client. It was all arranged, and this is the result of that arrangement.

Q. And this is the recorded statement that you testified to yesterday?

494 A. It is.

Mr. Hackbert: I offer the statement in evidence, if the Court please, and I ask leave to play part of it to the jury, not the entire statement, but such portions of it as we deem material.

Mr. Waitkus: No objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBIT 7 was admitted in evidence, and the following portions thereof were played to the jury:)

"Mr. Gibson, I am Mr. Cogswell, the division claim agent of the E. J. & E. Railway Company, and we are in

Mr. Waitkus's office at 569 Broadway, and it is about two o'clock in the afternoon of January 13, 1953. Also present with yourself and me is Mr. Waitkus.

Q. "Now, would you state your full name, Mr. Gibson?"

A. "Clairon Vern Gibson."

Q. "What is your age, Mr. Gibson?"

A. "Forty-eight."

Q. "Where do you live?"

A. "At 312 Chase Street."

495 Q. "Were you employed by the E. J. & E. Railroad Company?"

A. "Yes."

Q. "What was your occupation?"

A. "Timekeeper."

Q. "Did you have an account number while you were working?"

A. "No account number."

Q. "And what department were you in?"

A. "In the accounting division."

Q. "I see. And during what period were you so employed?"

A. "Between February 14, 1951 to September 30, 1952, when I went to the hospital."

Q. "I see. And during that period of time there was a time when you were supposed to have been injured; is that correct?"

A. "Yes, sir."

Q. "Do you remember the date of that accident, approximately?"

A. "Approximately December 13th, of '52—'51, 1951."

Q. "In other words, about nine months before you left the service, is that correct?

496 "And now, in your own words, would you tell me just exactly what occurred to you at that time?"

A. "Well, on December 13th, approximately December 13th, I was working overtime on the payrolls, and George Marjanian was working with me, in building 100 at Kirk Yard, at Gary, Indiana. We got our work approximately done, was cleaning up, and we had to borrow an adding machine that George asked me to put underneath my desk, so I shoved the adding machine underneath the desk, and when I backed out, I didn't back out far enough, and when I lifted up, I cracked my head upon the top of the desk drawer."

Mr. Hackbert: Now, if you will turn toward the end of the statement.

"Now, I am going to play this back. If you want to add anything to it at that time, you can do so."

Q. "Now, Mr. Gibson, you have heard this recording played back; is that correct?"

A. "Yes, sir."

Q. "Now, is there anything you want to add to this?"

A. "No, there is nothing I know of."

497 The Court: I might say I have informed counsel for both parties that if there are any additional parts of this record that either party should want the jury to hear, it may be done.

I will say to counsel now, if the plaintiff wants any additional parts read back, he may have it done at this time.

Mr. Hackbert: That is all, Mr. Cogswell.

Mr. Waitkus: May I ask one question that I did not ask Mr. Cogswell while he was on the other day?"

Cross-Examination by Mr. Waitkus.

Q. Is shanty number 100 still standing?

A. No, sir, it is not.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

498 RAYMOND T. BRASEL, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Hackbert.

Q. Will you state your name?

A. Raymond T. Brasel.

Q. Where do you live, Mr. Brasel?

A. I live at 301 Chase Street, in Gary, Indiana.

Q. By whom are you employed?

A. By the Elgin, Joliet and Eastern Railway Company.

Q. In what capacity?

A. Assistant vice-president in charge of personnel.

Q. How long have you had that job?

A. About ten days.

Q. Prior to that time, Mr. Brasel, what was your job?
A. I was supervisor of personnel in the same department.
Q. For how long had you held that job?
A. About four years.
Q. And that was your position with the E. J. & E. 499 in late 1951 and 1952, was it?
A. That is right.
Q. Do you know Mr. Clarion Gibson, the plaintiff in this case?
A. Yes, I do.
Q. For how long a period of time have you known him?
A. Between five and six years, I would say.
Q. Did you know him before the time he went to work for the E. J. & E.?
A. Yes, I did.
Q. As a matter of fact, you had something to do with steering him to the E. J. & E. for the job he took there, didn't you?
A. That's right.
Q. Now, in September and October, of 1952, did it come to your attention that Mr. Gibson was in Billings Hospital, in Chicago?
A. Yes, it did.
Q. Did you go to visit him there at the hospital?
A. I did.
Q. Can you tell us about when that was?
A. I have no clear recollection of the time, Mr. Hackbert; I think that could be established otherwise, but 500 there is nothing in my recollection by which I can establish it to my satisfaction so that I could testify confidently about it.
Q. About how long a time did you spend, if you remember, visiting him in the hospital?
A. Oh, I would say I was there at least an hour.
Q. And how did he appear to you, so far as his mental condition was concerned, his ability to carry on a conversation?
A. Oh, I think that he was perfectly competent. He seemed cheerful, on the road to recovery, or at least apparently in normal spirits.
Q. Now, during the course of that conversation, did you have any conversation with him about the facts and circumstances of an incident when he bumped his head on the desk while at work?

A. Yes, I did.

Q. Will you tell us what he said?

A. As I recall, he related to me having worked overtime one evening in building 100 in Kirk Yard. He had occasion to use an adding machine in the performance of work on the payroll, and when the work was finished, he started to put the adding machine away. He put it
501 away under a desk, and evidently pushed it back up against the wall underneath the desk. When he started to back out from underneath the desk he stood up too soon and bumped his head on the bottom of the desk top.

Q. Was there anything said by Mr. Gibson in that conversation with you with reference to his foot slipping as he backed out from under the desk?

A. I recall nothing of that sort.

Q. Was there anything said with reference to the presence of any foreign matter under the desk, such as pebbles, grease, dirt, or anything of that character?

A. No, I have no recollection that there was any such mentioned.

Q. Did you have any conversation with him at that time, Mr. Brasel, as to whether or not he had a claim of any kind against the E. J. & E. for that incident?

Mr. Waitkus: We are going to object to any evidence about any claim against anybody.

Mr. Hackbert: I think, if your Honor please, that it is material.

502 Mr. Waitkus: You can go into the facts, into any statement he might have made regarding this blow, but as far as any claims, I don't think it is competent.

Mr. Hackbert: I think I want to make this statement out of the presence of the jury.

(The following record was made out of the hearing of the jury:)

Mr. Hackbert: I propose to show by this witness, if the Court please, that this witness is by training a lawyer; that Gibson asked him if he thought he had a claim against the E. J. & E. on this incident, and that Mr. Brasel told him, on the facts as related to him, he didn't think he had any claim against the E. J. & E., and that it was after that advice that for the first time in this case there creeps in any form of any foreign matter under the desk. Now, I think it is material for the purpose of showing that the claim of the presence of any foreign matter is a belated fabrication.

503 Mr. Waitkus: I want to object to any of that, because of the fact that, as far as Mr. Brasel is concerned, he is an attorney, and we don't know in what capacity he talked to Mr. Gibson. It may have been a confidential communication between the two of them.

Mr. Hackbert: I will cover that, that he was not employed as an attorney.

Mr. Waitkus: As far as this statement is concerned, whether or not he had all of the information from Mr. Gibson does not appear in the record, from the testimony of this man, and, of course, there is no showing here that he at any time tried to get all of the information from him regarding the facts.

The Court: The objection is overruled. The latter point, I think, is a matter of weight. The objection is overruled, if the witness is qualified with regard to what relationship there was between him and the plaintiff.

(And thereupon proceedings were resumed within the hearing of the jury.)

504 By Mr. Hackbert:

Q. Preliminary to that question let me ask you this: You are by training a lawyer, are you not?

A. That's right.

Q. When were you admitted to the bar?

A. November 29, of 1950.

Q. And in Illinois, rather than in Indiana?

A. That's right.

Q. Now, at the time you had this conversation with Mr. Gibson at the hospital, you had not been employed by him as a lawyer to represent him in connection with any claim against the E. J. & E., had you?

A. No, I had not.

Q. Now, in the course of that conversation with Mr. Gibson, did Mr. Gibson make any inquiry of you and did you make any response to him with respect to whether, on the facts as he had related them, he had any claim against the E. J. & E. for injuries sustained as the result of that incident of bumping his head?

A. I can't testify confidently that it was during the course of that conversation, but during the course of conversations with Mr. Gibson, either on that date or sub-
505 sequently, I did have occasion to answer questions as to whether Mr. Gibson had a valid claim against the E. J. & E.

Q. What answer did you make?

Mr. Waitkus: We are going to ask that the answer be stricken. There is no showing when this was.

The Court: I think you better try to fix the time and place, as best you can.

By Mr. Hackbert:

Q. How closely can you fix the time and place?

A. As best I recall it, it was on the night when I visited Mr. Gibson in the hospital, but I wouldn't testify to that absolutely. I know that it was either during the course of that conversation or in subsequent conversations when I did discuss the matter with Mr. Gibson.

Q. That was after he returned from the hospital that you had those subsequent conversations?

A. Yes, that's right. On various occasions after that, we discussed this matter.

The Court: In the hospital, or out of the hospital?

The Witness: Out of the hospital, your Honor.

506 The Court: Where?

The Witness: Oh, I met Mr. Gibson in various places, sometimes on the street, occasionally at my home, and occasionally at his, and this was customarily a topic of conversation between us.

By Mr. Hackbert:

Q. How close do you and he live?

A. Well, we are virtually across the street from each other.

Q. And you would see each other frequently during the course of the week?

A. That's right.

Q. Very well. Now, going back to my initial question, what reply did you make to his inquiry?

A. I indicated to Mr. Gibson that under the facts as he had related them to me, it was my opinion that he did not have a valid claim against the company for any negligence on its part. I think that was about the sum and substance of my opinion to him.

Q. Now, at the time you expressed that opinion to him, prior to that time had there ever been any mention by
507 him to you of the presence of any foreign matter under his desk or under his chair?

Mr. Waitkus: He has gone into that, your Honor.

Mr. Hackbert. I want to tie it up.

The Court: Overruled.
A. Not so far as I can recollect.
Mr. Hackbert: You may cross-examine.

Cross-Examination by Mr. Waitkus.

Q. Mr. Brasel, did you say that you are a practicing attorney?
A. No, sir, I did not.
Q. You were admitted to the bar in November, of 1950?
A. That's right.
Q. And you went to work for the E. J. & E. immediately?
A. No, sir, I had gone to work for the E. J. & E. on October 1st preceding that date.
Q. And you have been working for the E. J. & E. since October, of 1950?
A. That's right.
508 Q. When did you come to Gary, Mr. Brasel?
A. To reside in Gary?
Q. Yes.
A. On December 11, 1948.
Q. And were you living in this neighborhood when Mr. Gibson moved there?
A. Yes, I was.
Q. Now, you say you went to the hospital during the time that Mr. Gibson was being operated?
A. I went to the hospital to visit Mr. Gibson; I visited him on two occasions in the hospital; each occasion had to do with a different confinement to the hospital. He was in the hospital twice, or perhaps more, as I recall, and I visited Mr. Gibson twice while he was in the hospital.
Q. Was that at Billings?
A. I believe it was. I never actually took the trouble to ascertain whether it was, or not. I simply followed my directions to the hospital.
Q. Well, how long were those visits apart?
A. I have no recollection.
Q. Well, would it be two months, three months?
A. I couldn't honestly say.
Q. Was his condition the same each time you saw him?
509 A. No, I think not. The first time, as I recall, he already had been under treatment in the hospital, and I visited him during his convalescence. The second time,

I visited him on the day preceding what I believe was the second operation, and at that time I took Mrs. Gibson and two of the children in to visit Mr. Gibson preceding the operation.

Q. At that time was Mr. Gibson in a coherent state?

A. I would say definitely, on both occasions, yes.

Q. Isn't it a fact that at the time he was being operated on, on October 22nd, that he had an infection, a form of meningitis, and that he wasn't even able to talk to you?

A. I feel I have no qualification to answer that question.

Q. Do you want to tell us you were able to talk to him at that time?

A. I believe that—yes; I believe that our conversation was coherent, yes.

Q. How long a time did you spend with him?

A. On which occasion?

Q. The second time.

A. The second time, it seems to me we spent per-
510 haps an hour and a half. It was during the course, I believe, of Sunday afternoon.

Q. And that was the day before the operation?

A. Yes, it was, as I recall it.

Q. Did you visit him any more?

The Court: At the hospital, you mean?

Mr. Waitkus: That's right.

A. No; I had good intentions; I was going to go up to see him, but before I did, he came home.

Q. Have you practiced law any at all, Mr. Brasel?

A. No, I haven't.

Q. Have you ever tried any cases?

A. No.

Q. In other words, all your work has been working in the office for the E. J. & E.; is that right?

A. That's right.

Q. And this advice you gave Mr. Gibson, did you tell him anything about seeing any attorney?

A. There was an occasion upon which the matter of an attorney was brought up in the conversation, and I advised—I believe at the time I was talking to Mrs. Gibson; I advised Mrs. Gibson that I did not want to get into this thing too deeply in the matter of advising on or dis-
511 cussing it because of the delicacy of my relationship in the situation; on the one hand, I was talking to a neighbor and a friend, and on the other, I worked for the

company that was concerned as a defendant or potential defendant in this matter, and therefore I suggested that they put the matter in the hands of a competent attorney and follow his advice from that point on.

Q. As far as you are concerned, Mr. Brasel, you had been friendly with these people prior to his going to the hospital?

A. That's right, I had.

Q. Mr. Brasel, you noticed Mr. Gibson prior to the time that he went into the hospital—

Mr. Hackbert: If your Honor please, I think this is going beyond the scope of the direct examination.

The Court: Let him finish the question.

By Mr. Waitkus:

Q. Can you tell us when you first noticed Mr. Gibson limp and drag his leg?

The Court: I will sustain the objection, as not being within the scope of the direct examination.

By Mr. Waitkus:

512 Mr. Brasel, did you take any of this information down on paper of any kind?

A. No, I didn't. I think perhaps there has been a little misimpression with respect to the advice I gave Mr. Gibson. There was nothing formal about it; it was all in the course of friendly everyday conversation.

Q. In other words, as far as you were concerned, you were not probing into the facts; it was just a general conversation when the fellow was in the hospital; is that right?

A. That's right.

Q. Did Mr. Gibson mention to you at the hospital about Dr. Hoffman's asking him about the blow that he received to his head?

A. It seems to me that there was some mention of that, yes.

Q. You say you were appointed assistant vice-president about ten days ago?

A. Effective the 16th.

The Court: Vice-president.

By Mr. Waitkus:

Q. As far as you are concerned, you just have given us your general recollection of the time you recall when 513 he was in the hospital?

A. That's right.

Q. There were other things you talked about, I presume?

A. Yes.

Q. Do you recall what those things were at this time?

A. I don't recall anything significant in our conversation that goes beyond what I have related here.

Q. But you did spend an hour and a half with him in the hospital?

A. Yes, sir, I did, on the second occasion.

Q. That was the day before his abscess operation?

A. As I recall it, it was.

Q. Since Mr. Gibson was in the hospital, can you tell us whether or not you noticed any change, as far as his memory is concerned, anything of that sort?

Mr. Hackbert: I object to that. It is not within the scope of the direct examination.

The Court: Sustained.

Mr. Waitkus: I think that is all.

514 *Redirect Examination by Mr. Hackbert.*

Q. Did you have this conversation with Mr. Gibson about this incident of bumping his head on the desk on the first visit you made to the hospital, or the second, if you recall?

A. The first visit.

Recross Examination by Mr. Waitkus.

Q. Did you talk to him about it on the second visit?

A. I don't recall talking about it on the second visit. It is possible that we did.

Q. Did you informally notify the company about your conversation with him?

A. No, I said nothing about the thing at all, until the claim was filed, suit was filed, and as a result of the filing of the suit our general claim agent asked me if I knew Mr. Gibson. I answered yes. What followed is too long for elaboration here.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

515 Mr. Hackbert: If your Honor please, I should like to offer in evidence Defendant's Exhibit 5, not as evidence of the truth of any of the contents thereof, but merely

as evidence of the nature of the initial notice of this alleged accident to the defendant.

It was testified that this was the first notice. This is your letter, Mr. Waitkus.

Mr. Waitkus: I admit it was the first notice, your Honor.

The Court: Are you objecting to the exhibit?

Mr. Waitkus: I don't know, offhand, what it is, your Honor.

(Defendant's Exhibit 5 was handed to Mr. Waitkus.)

Mr. Waitkus: No objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBIT 5 was admitted in evidence.)

The Court: Do you want to read this exhibit, or tell the jury what it is?

Mr. Hackbert: The exhibit is a letter from Mr.
516 Waitkus to the E. J. & E., to the attention of Mr. Cogswell, dated December 5, 1952, referring to an alleged accident in December, of 1951, to Mr. Gibson.

The Court: You will have this in your jury room, if you want to refer to it.

Mr. Hackbert: The defendant rests, if the Court please.

The Court: Is there any rebuttal?

Mr. Waitkus: I want to put Mrs. Gibson on, your Honor.

And thereupon the plaintiff, to support and maintain the issues in his behalf, introduced the following evidence in rebuttal.

LOIS M. GIBSON, a witness on behalf of the plaintiff in rebuttal, having heretofore been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. You are the same Mrs. Gibson who was on the stand here several days ago?

A. Yes.

Q. Yesterday, I mean.

A. Yes.

517 Q. Mrs. Gibson, were you present at Billings Hospital the first and second times that Mr. Brasel visited Mr. Gibson?

Q. There were other things you talked about, I presume?

A. Yes.

Q. Do you recall what those things were at this time?

A. I don't recall anything significant in our conversation that goes beyond what I have related here.

Q. But you did spend an hour and a half with him in the hospital?

A. Yes, sir, I did, on the second occasion.

Q. That was the day before his abscess operation?

A. As I recall it, it was.

Q. Since Mr. Gibson was in the hospital, can you tell us whether or not you noticed any change, as far as his memory is concerned, anything of that sort?

Mr. Hackbert: I object to that. It is not within the scope of the direct examination.

The Court: Sustained.

Mr. Waitkus: I think that is all.

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Q. Did you have this conversation with Mr. Gibson about this incident of bumping his head on the desk on the first visit you made to the hospital, or the second, if you recall?

A. The first visit.

Recross Examination by Mr. Waitkus.

Q. Did you talk to him about it on the second visit?

A. I don't recall talking about it on the second visit. It is possible that we did.

Q. Did you informally notify the company about your conversation with him?

A. No, I said nothing about the thing at all, until the claim was filed, suit was filed, and as a result of the filing of the suit our general claim agent asked me if I knew Mr. Gibson. I answered yes. What followed is too long for elaboration here.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

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The Court: Are you objecting to the exhibit?

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(Defendant's Exhibit 5 was handed to Mr. Waitkus.)

Mr. Waitkus: No objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBIT 5 was admitted in evidence.)

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The Court: You will have this in your jury room, if you want to refer to it.

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LOIS M. GIBSON, a witness on behalf of the plaintiff in rebuttal, having heretofore been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. You are the same Mrs. Gibson who was on the stand here several days ago?

A. Yes.

Q. Yesterday, I mean.

A. Yes.

517 Q. Mrs. Gibson, were you present at Billings Hospital the first and second times that Mr. Brasel visited Mr. Gibson?

A. I was.

Q. Do you recall if there was any conversation regarding the injury or how Mr. Gibson sustained it while he was in the hospital in the presence of Mr. Brasel?

A. In the presence of Mr. Brasel, and I myself would not state which time, the subject came up that Vern was telling him he had hurt himself somewhere. At that time, he was not even sure where, whether he had hurt it on the railroad or where he had hurt it, but he knew he had bumped his head, and he was trying to remember.

Q. In other words, was Mr. Gibson very coherent at that time?

A. Very incoherent.

Mr. Hackbert: I object to that, as calling for a conclusion.

The Court: Sustained.

By Mr. Waitkus:

Q. Can you tell us whether Mr. Gibson was able to speak with both you and Mr. Brasel?

518 A. He was able to talk, but it was very slow, and even in forming his words he was trying to think what he wanted to say, and by the time he got his words out, his thoughts were gone.

Q. The second time Mr. Brasel talked to him, that was just before Mr. Gibson was to be operated on for the abscess; is that right?

A. The time that I am referring to is that time. I don't remember of going into it at the hospital more than one time.

Q. Just the one time?

A. Just the one time, that I remember of.

Q. And you were with him each time that he was there?

A. Yes, I was.

Q. Between the first operation and the second operation, can you describe Mr. Gibson's condition as he neared the 22nd of October, when he was being operated on for the abscess?

Mr. Hackbert: I don't think that is rebuttal evidence, if the Court please. The statement we relied on was made at the first visit.

519 Mr. Waitkus: He said he talked to Mr. Gibson—

The Court: Unless she was there.

Mr. Waitkus: She was there; she said she was.

By Mr. Waitkus:

Q. You were there both times?

A. I was there both times.

Q. Will you describe Mr. Gibson's appearance the second time?

A. The second time, Mr. Gibson's—he would talk to you a few minutes, and his mind drifted off.

Mr. Hackbert: I object to that, if the Court please. She can't testify that his mind drifted off.

The Court: Sustained. That is struck. The jury should disregard that.

By Mr. Waitkus:

Q. Let me ask you this, Mrs. Gibson, you have been married to Mr. Gibson for a long time?

A. That is right.

Q. At the time you were at the hospital the second time, would you say he was in his right mind?

A. He was not.

520 Mr. Hackbert: I object to that, if the Court please.

The Court: I will sustain the objection. The answer is struck.

By Mr. Waitkus:

Q. Did Mr. Brasel at any time ask you about the particular facts as to how this thing happened, in detail, at any time?

A. Ask me, no.

Mr. Hackbert: I object to that, as immaterial. It doesn't make any difference what she says about it.

The Court: Sustained.

Mr. Waitkus: That is all.

Mr. Hackbert: That is all.

(And thereupon the witness was excused.)

Mr. Hackbert: Mr. Waitkus, may I ask, do you propose to play any part of this recording? If not, they want to take the machine back to Chicago.

Mr. Waitkus: I don't know. You haven't given me a copy of it.

Mr. Gibson, will you take the stand, please?

521 CLAIRON VERN GIBSON, plaintiff in said cause of action, and a witness in his own behalf in rebuttal, having heretofore been duly sworn, testified as follows:

Direct Examination by Mr. Waitkus.

Q. Mr. Gibson, you heard Mr. Brasel testify here this morning, did you not?

A. Yes, sir.

Q. Will you tell us whether you recall any conversations with Mr. Brasel regarding how you injured your head while you were in the hospital, in Billings Hospital?

A. I recall Mr. Brasel being in the hospital to visit me, but I don't recall what was talked about.

Q. Do you recall that particular occasion, whether he had been there on more than one occasion?

A. I remember one time, I remember he was there one time, and that was the time that he took the family—I don't know whether he brought them in or took them home, but it seems like he took them home. I remember that time.

Q. You don't recall of any definite conversation regarding how you received this injury?

522 A. All I can recall was that what I was told.

Q. As far as your own recollection, you don't have any recollection?

A. I don't recall that.

Mr. Waitkus: That is all.

Mr. Hackbert: Will you read the last two questions and answers?

(The record was read.)

Cross-Examination by Mr. Hackbert.

Q. Do I understand what you mean to say is that you don't now recall having had any such conversation with Mr. Brasel as he testified to, or do you mean you don't recall having had any such accident as you testified to; which is it?

Mr. Waitkus: He didn't say that.

Mr. Hackbert: I don't know what his last answers mean. I would like to have him clear it up.

A. It has been hard for me to remember, because I can

be answering a question, and then all of a sudden I don't know that I am talking, really, and then I realize I am
523 talking, and I don't know what the question was.

Q. Is that true as to all past events?

A. There is times when my mind seems to be clear, and then there is other times, as I say, I kind of, well, wake up, maybe, and then I realize I am talking, and I ask what I am talking about, what was I talking about.

Q. Do I understand from what you are testifying to now that you don't recall the circumstances of this incident of bumping your head under the desk, is that one of the things you find yourself talking about and not knowing it?

A. That is one of them, yes. Dr. Hoffman was the one that brought that to my attention.

Mr. Hackbert: You have answered my question. I think that is all.

Mr. Waitkus: That is all.

(And thereupon the witness was excused.)

The Court: Anything further?

Mr. Waitkus: I believe that is all.

Mr. Hackbert: Could we have an adjournment while
524 my associates get the machine out of the way?

The Court: I understood that he wanted to ascertain whether there was any part that he wanted (referring to disk-recorded statement of Mr. Gibson).

Mr. Hackbert: I thought he said that was all.

Mr. Waitkus: We won't have any use for it.

The Court: Do you rest?

Mr. Waitkus: We rest, your Honor.

The Court: Does the defendant rest?

Mr. Hackbert: The defendant rests.

The Court: The record may show that both the plaintiff and defendant rest.

Ladies and gentlemen, we will take a couple of minutes recess.

(The jury left the courtroom.)

Mr. Peters: If the Court please, the defendant renews its motion for a directed verdict, on the same grounds.

The Court: You are filing a written motion?

Mr. Peters: Yes, your Honor.

525 The Court: The motion is denied, with the reservation provided by the rules.

The record may show that at the close of all the evidence the plaintiff files his requested instructions numbered 1

to 30, inclusive, and that the defendant files its requested instructions numbered 1 to 6, inclusive.

I will say to the clerk now that each side has a maximum of one hour for argument.

Mr. Hackbert: May I inquire if the Court has reached any decision as to negligence so far as lighting is concerned?

The Court: I am going to withdraw that as a claim of negligence and not submit it to the jury.

Is there any reason for the jury to come back in, to be told that they can go out for a bite to eat?

The marshal is informed to tell the jury, without their coming back into the courtroom, that they may go out to lunch, and to be back here at 12:30. Explain to the jury
526 that that is the purpose for having an adjournment now. I would like to have them all back here at 12:30.

(And thereupon a recess was taken until 12:30 o'clock in the afternoon.)

And at 12:30 o'clock in the afternoon of said day, Tuesday, September 27, 1955, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

(The following record was made in the absence of the jury.)

Mr. Hackbert: I note that the blackboard has been brought back into the room, your Honor. I want to say this: We have no objection to the use of the blackboard for the purpose of making any sketch or illustration that would tend to help the jury in their understanding of the facts in this case, but if the blackboard is intended to be used for the purpose of writing down any assorted
527 figures with respect to either liability of damages, or to make any tabulation of damages, we object to it, on the ground that our procedure contemplates an oral argument to the jury and not a written argument in any form; and our procedure does not contemplate that any fact shall be presented to the jury in written form and remain within their view for any considerable period of time by means of the use of a blackboard, or similar device.

The Court: Well, I am not so sure; I have never had this question presented before, but the fact that our rules provide for oral argument—

Mr. Waitkus: The fact of computing something on the blackboard, if the Court please, you are still doing it orally.

Mr. Hackbert: But you leave it there. That is the vice of it.

Mr. Waitkus: They can compute, too; they can use the same blackboard; I am not stopping them; they have the same right to the same privilege.

528 Mr. Hackbert: The jurors are not permitted to make notes of calculations in the jury box.

The Court: This is my ruling:

If you want to use the blackboard, you may, for computation, but as soon as it is computed there must be an immediate erasure.

(And thereupon the jury came into the jury box.)

The Court: Ladies and gentlemen, you have heard the evidence. Both sides will have an equal amount of time for argument; the plaintiff has the right to open and close the arguments, but each side will have the same amount of time.

You may proceed.

(Following arguments of counsel, the Court instructed the jury, as follows:)

529 INSTRUCTIONS OF THE COURT.

The Court: Ladies and gentlemen of the Jury:

As you know, it now becomes my duty to instruct you upon the legal principles that are involved. As you have been told on previous occasions, you decide what the facts are, you decide what happened on the 12th of December, 1951, and the events leading up to it, and the events that happened after that, but as to the legal principles that are involved, you must of course abide by the instructions that the Court gives you. A judgment in a court of law is a judgment according to law, and that is the purpose of these instructions. It wouldn't make any difference whether it was Mr. Gibson or somebody else suing, or whether the E. J. & E. was the defendant. If a similar case were being tried here, there would be certain legal principles that would be applicable. Of course, not all legal principles that are in the books are applicable to every case. That

is the reason that the judge has to confer at the end of the case as to what legal principles are involved, and what the court is going to give, but whatever the judge does
530 give, that is the law of the case. And so it is your job to decide the facts, but it is also your job to arrive at a verdict having in mind not only the facts but the legal principles that are involved. Of course, you decide, you are the only people that should decide what the facts are. Even if I should say what I think about the facts, you should disregard it. I am not going to, at least I am not going to do it consciously, or give any appraisal of what I think the facts amount to or what you should find, but if I did, and I could comment, you should disregard it, at least you would not be bound by it, but you are bound by these legal principles.

Well, anyway, as you know, this is a lawsuit brought by Mr. Gibson against the Elgin, Joliet and Eastern Railway Company. I am not going to read the complaint; many parts of it is not necessary to read. I will say that Mr. Gibson said that the defendant operated a railroad, and one of the places where it operated its railroad was known as Kirk Yard, in Gary. And, of course, there is no dispute about that, that there was this Kirk railroad yard over
531 in Gary operated by the Railroad Company.

He also says that on December 12, 1951, and before that, he was employed as a timekeeper. Well, we know that, and the defendant admitted it. And that he worked in building 100.

Now, all of the other allegations of Mr. Gibson's complaint are denied by the defendant.

He said workers coming into the building where he worked would bring shovels and leave deposits of snow, gravel, cinders, pebbles and grease on the floor. In order to safeguard the adding machines from horseplay by the men who came into the shanty that these machines were stored out of the way and out of sight.

He said also in his complaint that he had to work overtime to get the payroll sheets out in time; that he was working overtime on December 12, 1951, at about 9 o'clock P. M., and was placing a portable adding machine under the desk; that his foot slipped on the floor when he started back under the desk and as he attempted to catch his balance his head hit the bottom of the desk drawer, and that as a result of this blow he suffered a brain con-

532 cussion; and thereafter he suffered severe headaches, and later the right side of his body became weak and totally paralyzed; that as a result of this blow, he received medical treatment and had to have an operation, and that he is now disabled; that before the accident, he was in good health, but since then he has suffered permanent damage to his physical condition.

He says that he proximate cause of his injuries was the defendant's negligence in:

(1) Failing to furnish him a safe place to work;

(2) Permitting pebbles, cinders, gravel and grease to accumulate on the floor of this building; and

(3) Failing to keep the floor clean.

He says that before the accident he was earning fourteen dollars and some cents a day; that he is now incapable of gainful employment; and that he has incurred certain medical expenses; and his prayer is that he should recover $150,000.

533 The defendant, as I say, denies all of these allegations other than his employment and the fact that it runs this railroad and maintains this Kirk Yard, and it denies that it is liable to the plaintiff.

The defendant also said in one of its defenses in its answer that Mr. Gibson's injuries were solely caused by his own negligence, and that his physical condition, present physical condition, is not the result of any occurrence that the plaintiff alleges in his complaint, but arises from conditions not related to or arising from his employment by the Railroad.

There are other allegations which are not pertinent to this case. The only reason that I read these to you is to more or less point up the background of this case. These allegations that are in this complaint and the answer, of which I have a summary here, are not evidence; they are not evidence, and should not be treated by you as such. The evidence is what you have heard here in the courtroom, including the exhibits.

534 Now, Mr. Gibson sues—the reason he is here in this court, he could sue in the state court, he can sue in the federal court, but he sues under a certain law that was enacted by Congress—I believe the present law was enacted back in 1908, and there was a 1939 amendment. It has to do with railroads, common carriers, carriers that handle freight or passengers and service the public in that

regard. This is the way the statute reads, in pertinent part:

Every common carrier by railroad while engaging in commerce between any of the several states—that means interstate commerce; if it was an Indiana railroad, going just in Indiana, Congress wouldn't have any right to legislate over that kind of a railroad, so it has to be a railroad that moves interstate, and that is the kind of a railroad that the E. J. & E. is— Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharfs or other equipment.

That is the statute under which Mr. Gibson brought this suit.

535 Now, the language includes places furnished by the railroad to be used by its employees for the performance of their work. That is, if the railroad is negligent with regard to the way it maintains its premises, or its tracks, or cars, or any of its equipment, including places where its employees work, then it would be liable in damages because of any negligence. I will get to that later on, as far as the question of negligence is concerned.

But first let me say, before I talk about what is negligence, that this statute, permitting railroad employees to sue railroads because of injuries they receive, does not make the railroad an insurer. Just because an accident happens, that doesn't make the railroad liable. The question is whether or not there was fault or negligence on the part of the railroad, and I say again that I will come to the definition of what is negligence in a moment.

Neither, as I told you once before, is this Federal Employers Liability Act, a part of which I just read,—neither is it a Workmen's Compensation Act. As you know,

536 Indiana and other states have workmen's compensation statutes or laws which provide that if an employee receives an injury during the course of his employment, the employer—or sometimes the insurance carrier that insures the employer against such happenings—the employer is liable, regardless of any negligence or fault on the part of the employer. There is a specific schedule of amounts that the employee receives because of such injuries. Now, the Federal Employers Liability Act is not that kind of a

statute. It permits employees of railroads to recover, and there is no limit as to how much they can recover, in the event that the railroad is liable because of negligence. There has to be a showing of negligence on the part of the railroad that caused the injury.

This statute, by the way, reads:

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this act.

537 In other words, there might be some people who, even though they might be working for a railroad, might not be in what we call interstate commerce. Now, that might be a question that would be put before you, but I have ruled that Mr. Gibson was engaged in interstate commerce, so that that question is not before you, the question of whether or not he was the kind of an employee that could sue under this act. I am not saying that he is or is not entitled to recover. That is a question for you to decide. You will have to ask yourselves and you will have to answer whether or not the Railroad Company was negligent. As I say that is a question, was the Railroad negligent.

There is another question, but that would not defeat Mr. Gibson's recovery, but if you would answer it in the affirmative it might affect the amount of his recovery. The question I am talking about is, was Mr. Gibson himself negligent. As I say, that would not defeat his recovery, but it might affect the amount of his recovery.

538 And then, of course, the third question: If you found that the defendant was negligent, you would have to decide what Mr. Gibson's damages were.

So, now, what is negligence, because that is the question that you are going to have to ask yourselves, and answer, was the defendant negligent. The definition of negligence I am going to give you in a moment, but let me say this: The law sets up the standard of a reasonable person, a reasonable man, and says, is the conduct involved different than what a reasonably careful, a reasonably prudent, person would do under similar circumstances. That is the test that the law applies and that you have to apply to this set of circumstances.

Negligence is defined in law as the doing of an act which a reasonably careful and prudent person would not have done under the same or similar circumstances, or the failure to do an act which a reasonably careful and prudent person would have done under the same or similar circumstances. That is the definition of negligence.

Now, what is contributory negligence, and how is it treated under this act? Contributory negligence is the negligence of a party who is injured, of a plaintiff who brings a lawsuit. Ordinarily, negligence of the in-
539 jured party, contributory negligence on his part, if he helped contribute to the happening, would be a defense; it would bar that person completely from any recovery. However, in cases brought under the Federal Employers Liability Act, such as this case is, contributory negligence on the part of an injured person is not a defense, but if the injured person has committed contributory negligence which has proximately contributed to the cause of the injury, and if the plaintiff in such action is entitled to recover by reason of any negligent act or acts on the part of the defendant, then the damages shall be reduced or diminished by the jury in proportion to the amount of negligence attributable to the injured employee. So if you decide that the Railroad was negligent, and is liable to the plaintiff, and you should also decide that Mr. Gibson himself was negligent, then it would not defeat a recovery by him, but you would have to consider how much his injury was attributable to his negligence and diminish his recovery accordingly in proportion.

If you should find that Mr. Gibson was negligent, and that his negligence was the sole proximate cause of his
540 injury, then of course the defendant would not be liable.

And if you should find that this happening was through the fault of no one, that there was no negligence involved, but that it was an accident, something that was not caused by any negligence, or lack of care, or through any carelessness, on the part of anyone, then Mr. Gibson could not recover from the Railroad.

As I said, fault or negligence on the part of the Railroad is required before the plaintiff can recover, and that fault or negligence cannot be inferred from the mere fact that Mr. Gibson fell or was hurt. You have to find, not just the fact that an accident happened, you have to find that there

was negligence, some conduct on the part of the Railroad which amounted to carelessness or lack of care.

Now, I have talked to you about negligence, and what it is, and what part it plays with respect to whether or not the plaintiff can recover. There is another legal principle that is applicable, and that is, in order for negligence to be of any importance, if you find there was negligence, it must be a proximate cause of the injury or of the
541 happening,—in order to be of any importance as far as the plaintiff's recovery is concerned. For every result there is, of course, some cause back of it. The law does not attach any legal consequences to a remote cause; it is only a proximate cause.

And what is a proximate cause. This is the definition that I would like to read to you of what we mean by proximate cause. The proximate cause of an injury or happening is that cause which, in natural and continuous sequence, unbroken by an efficient, intervening cause, produces the injury or happening, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in motion the factors that accomplish or bring about the happening. It may operate directly or by putting intervening agencies in motion, but it must be a direct cause, not a remote one.

So, as I say, any negligence on the part of either the Railroad or Mr. Gibson, in order to be of any legal consequence, would have to be a proximate cause of his
542 injury. That is the reason why I am not submitting to you the question of whether or not the Railroad was negligent in the way it had this building 100 lighted, nor the way it handled the adding machines or the need for them, or the requirement of Mr. Gibson to work overtime. Those matters may be factors with regard to how this matter came about, but whether or not there was any carelessness or lack of care on the part of the Railroad in any of those particulars would not be proximate causes of this injury. In other words, the fact that there was a dim light in the shanty, that would not bring about this accident, itself; it might be one of the remote factors in it, but just that would not have caused this accident, couldn't have caused this accident.

There is this allegation that he has made with regard to the condition of the floor, and that is something for you to decide, as to whether or not the floor was in a proper

condition. And then you would have to decide, if it wasn't, whether or not it was a proximate cause of this happening that he has alleged and has brought before you in this case.

Now, the plaintiff, having brought this suit, has the
543 burden of proof of his case and of proving the allegations of his complaint by a preponderance of the evidence. The defendant would have the burden of showing any negligence on the part of Mr. Gibson.

What do we mean by preponderance of the evidence? By preponderance of the evidence is meant that the evidence must preponderate, must weigh heavier, on the side of the party having the burden. By preponderance, it does not necessarily mean the greater number of witnesses, but the greater weight of the evidence, taken altogether. If there is no preponderance, if the evidence on an issue is equally balanced, then there is no preponderance, and the party having the burden to establish that particular issue must fail.

I have some other instructions here that I would like to read to you with regard to the duties of the parties, and some instructions that have to do with this question of what is reasonable care in this kind of a setting.

It was the duty of the Railroad Company to exercise reasonable care to furnish Mr. Gibson with a reasonably safe place in which to work. Its duty was not limited to
544 such risks as it actually knew about, but extended to such risks as it ought to have known about in the exercise of reasonable diligence. In other words, the Railroad is charged with the duty of furnishing Mr. Gibson with a reasonably safe place in which to perform his work. That duty did not end with simply providing a safe place, in the first instance, but a further duty is imposed upon the Railroad of continuously exercising ordinary care to ascertain the condition of the premises where Mr. Gibson worked.

On the other hand, in order for the Railroad to be charged with negligence, it must appear from the evidence not only that some foreign matter, such as pebbles, cinders, gravel or grease, was on the floor under the desk at the time Mr. Gibson claims he received his injury, and that such condition was the cause, in whole or in part, of his injury, but it must also appear that this condition was actually known to the Railroad's employees, other than Mr. Gibson

himself, or that the condition had existed for such length of time before the evening of December 12, 1951, that the defendant, in the exercise of reasonable care, would or should have known of the condition. In other words,
545 the Railroad is chargeable with notice of any dangerous or unsafe condition which could have been ascertained by the exercise of reasonable care.

An employer is not required by law to take precautions against all possible injury to its employees. Its duty is to take reasonable precautions to protect its employees against such accidental injuries as it is reasonably foreseeable are likely to occur in the course of its business.

It was the duty of the plaintiff in this case to exercise ordinary and reasonable care for his own safety and protection, and, as I said, if you find that his negligence contributed to his own injury, then the plaintiff is not entitled to recover the full amount of the damages sustained by him, but his damages shall be diminished in proportion to the amount of negligence attributable to him.

Or, if you believe from the evidence that a failure on his part to exercise ordinary and reasonable care for his own safety was the only or sole cause of the accident resulting in his injuries, then you are instructed that the plaintiff is not entitled to recover in this case.

On the other hand, if you find from the evidence
546 that there was any negligence on the part of the Railroad which was one of the causes for the injury to Mr. Gibson, then he is entitled to recover, even though you should find that he himself was also guilty of negligence.

In this connection, you are further instructed that under the Federal Employers Liability Act the employee need not prove, in order to recover, that the negligence of the Railroad or its employees was the only proximate cause of his injuries. The Railroad is liable for injury to its employees even though its negligence is only a contributing proximate cause, as long as you find that the Railroad's negligence was, in whole or in part, a proximate cause of the injury complained of.

Now I am going to another subject, and that has to do with damages, if you find that Mr. Gibson is entitled to recover. I don't mean by giving this instruction to intimate or in any way to indicate, one way or another; that is a matter for your sole decision; but I do want to give you this damage instruction, if you reach that question.

In determining the amount of damages, if any, that
547 the plaintiff is entitled to recovery in this case, you may take into consideration all of the facts and circumstances pertaining to his injury proved by the evidence. You may consider what evidence, if any, there is of (1) the nature and extent of his physical injuries, if any, and the permanency of such injuries; (2) the physical disability of Mr. Gibson resulting from such injuries, and such further physical disability and loss of health, if any, that is reasonably certain to result from such alleged injuries; (3) the physical pain he has suffered as a result of such alleged injuries, and such further pain and suffering, if any, that is reasonably certain to result from such alleged injuries; and (4) the loss of earnings sustained by him as a result of such alleged injuries and such future loss of earnings and inability to work as is reasonably certain to result from such alleged injuries; and you may find for the plaintiff the present value from such a sum of money, if any, as in your judgment, under the evidence and instructions in this case, will be fair and reasonable compensation for any of such injuries and damages, if any, the plaintiff as a direct and proximate result of
548 the injuries in question has sustained.

There has been some testimony here, as you know, about Mortality Tables and the plaintiff's life expectancy. You may use those tables in your consideration with respect to the question of damages, if you reach that question. In allowing damages for future loss of earnings or pain and suffering, you should consider only such future loss of earnings or such future pain and suffering as the evidence establishes with reasonable certainty, reducing any damages that you may find for loss of future earnings to their present cash value in making adequate allowance for the earning power of money. In other words, the amount of money for future earnings, if paid today, would be less than if it were paid over a period because that money could be earning money on deposit, so that is the purpose for that instruction.

You must try this case, ladies and gentlemen, on the evidence that you have heard here in the courtroom. You are not to go outside of the evidence and conjecture; you are not to guess or speculate.

In your deliberations, you should not permit your-
549 selves to be influenced by sympathy for either party, but in reaching a verdict you should be governed by

the law and the evidence, and these two things alone. The fact that one of the parties is an individual and the other is a railroad should have no influence whatever upon you in reaching a verdict. The case should be tried precisely as if it were a controversy between individuals equal in all things. It is the duty of the jury to try this case upon the evidence that has been submitted and upon the law as received from the Court, putting aside all other considerations.

You are the exclusive judges of the weight of the evidence, the credibility of the witnesses, and as to what facts have been established. In determining the credibility of the witnesses, you have a right to take into consideration their demeanor, their candor and sincerity in testifying, or the lack thereof; their interest or lack of interest in the outcome of this case; their knowledge or lack of knowledge concerning the facts about which they have testified; their prejudice or bias, if any, that has been shown; their relationship, if any, to either party to the suit, and such other facts or circumstances which may have been shown
550 by the evidence, as will assist you in determining the weight you should give to the evidence in this case.

If you find that any witness knowingly testified falsely to any material fact, you may disregard all of the testimony of such witness wherein he has not been corroborated by other evidence.

In your deliberations you are to disregard entirely any testimony that was struck out. And if, during the trial, I made any remark about the evidence, or any other thing, it was not intended to indicate to you my opinion with reference to the merits of this case. You are to try this case solely upon the evidence that has been submitted and the legitimate inferences that may be drawn from the evidence.

Finally, in deliberating upon your verdict, each juror should exercise his individual judgment, so that when a verdict is agreed upon it will constitute the verdict of each individual juror. In arriving at a verdict, each juror should give due consideration to the views and opinions of the other jurors, and should listen to their arguments with a willingness to be convinced, and to yield to their
551 views, if induced to believe them to be correct, but no juror should agree upon a verdict unless he is convinced that it is correct, and unless it is a verdict which his conscience approves, and which such juror, under his oath and after full consideration, believes to be right.

It is your duty to reconcile all of the evidence, if you can. Failing to reconcile some of the evidence, then it is your duty to believe that evidence which to you seems to have the most probative value.

When you retire, ladies and gentlemen, you may choose your own foreman.

I have prepared for your consideration two forms of verdict. One reads, "We, the jury, find for the plaintiff and assess the amount of his damages in the sum of blank dollars." You should fill in the amount of damages that you arrive at and your foreman should sign that form of verdict if you find that the plaintiff should recover.

The other form reads, "We, the jury, find for the defendant." If you find that Mr. Gibson should not recover, then that is the form of verdict that you should use, and your foreman should sign that form of verdict.

552 In either event, whenever you have reached a verdict, you should return here to the courtroom.

I am going to ask you that you not begin your deliberations just momentarily, until I have had a chance to check. I may have misstated something, or failed to state something, overlooked something. I would not want you to begin your deliberations until I have had a chance to check with counsel, out of your presence, and let you know either to come back or to go ahead. It will only take a minute or two, and I will send word to you through the bailiff.

Will you be sworn, please, as bailiff?

(Charles Burks, deputy marshal, was sworn as bailiff.)

The Court: You may go to your jury room, ladies and gentlemen.

(And thereupon the jury left the courtroom.)

The Court: First, I would like to say to counsel with regard to objections that I usually handle them this way:

553 If there are any matters that I have overlooked, that you think I should call the jury back for, of course I want to do that. Otherwise, with your consent and waiver, I will tell the jury to go ahead, and you may make your formal objections to the charge, whatever you have.

Mr. Hackbert: If the Court please, the only thing upon which I am not clear is whether or not the jury has been adequately instructed that any foreign matter on the floor must not only be there long enough to charge the defendant with knowledge of its presence, but also it must have

been there long enough so that the failure to remove it by that time is unreasonable.

The Court: Well, I have given this instruction that I read to you before the arguments and said that I was going to give. I believe that covers it adequately. If you want to make a formal objection, of course, you may, but I am not inclined to call the jury back for any further instructions on that point.

Mr. Hackbert: I made the objection this morning, and I repeat it now, that the instruction on damages as tendered by the plaintiff seems to me to double up the same injury and bring it back in more than once, in that
554 it authorizes them to return a verdict for an amount which measures the nature and extent of his physical injury, and then an amount also for his physical disability. It seems to me that those are one and the same thing in a situation like this.

The Court: Well, I will overrule the objection.

Mr. Hackbert: I object to the instruction permitting a recovery on future loss of earnings, on the ground, as I recall the evidence, there is no evidence on which the jury could reasonably conclude that this man was not able to work in the future at some kind of gainful occupation or employment, if not to return to work, to the general kind of clerical work that he was doing up to the time he was in the hospital.

The Court: Objection overruled.

Mr. Hackbert: I object to the failure of the Court to submit to the jury the question whether—

The Court: Let me ask you, first, Mr. Hackbert—I want to give you full opportunity, give both sides full opportunity, to make a complete record, but is there any
555 particular thing that you think I should call the jury back for, that might be a misstatement or a failure to cover what I indicated to counsel prior to argument?

If not, then by agreement the jury can be told to go ahead, and you can make up the record.

Mr. Hackbert: The only misstatement I caught was the statement at one point when you said plaintiff's negligence would not bar his recovery, and then you went on to state the law accurately, and the subsequent statements may have cured the misstatement.

The Court: I think, in total, there is no question in context.

Mr. Hackbert: I think that is true.

I have no question for which the jury ought to be called back, no question that we have not gone over.

The Court: Mr. Waitkus?

Mr. Waitkus: I haven't any.

The Court: Is it all right to tell the jury to go ahead? And then you can make further objections to the charge, or failure to give requested instructions. Is that agreeable?

Mr. Hackbert: That is agreeable.

556 Mr. Waitkus: Yes.

The Court: Will counsel check the exhibits?

Mr. Waitkus: I assume there is no point in sending the hospital record.

The Court: I think it is part of the exhibits.

Mr. Hackbert: Maybe they will want to see what it is like.

Mr. Waitkus: As far as we are concerned, the record itself means nothing.

The Court: It is up to counsel. If either side wants it to go up—

Mr. Hackbert: Let's keep all of the exhibits together; then we aren't going to have them separated. It can't do any harm.

Mr. Waitkus: It can't do any good.

The Court: Well, it is an exhibit. If they want to look at it, it is there.

Mr. Peters: They are entitled to it, your Honor.

The Court: The bailiff is instructed to take the exhibits and forms of verdict to the jury room, and to tell the jury that they now may begin their deliberations.

Now, I am going to ask the plaintiff, do you have
557 any objections to the charge as given, or any failure to give requested instructions?

Mr. Waitkus: No, your Honor.

The Court: Mr. Hackbert?

Mr. Hackbert: On behalf of the defendant, we object to the failure of the Court to submit to the jury for determination as a question of fact the issue of whether or not the plaintiff was so engaged in interstate commerce as to come within the scope of the Federal Employers Liability Act, and we except to the failure of the Court to give defendant's tendered instruction No. 3, which would have submitted that question.

Do the tendered instructions go to the file?

The Court: Yes, they do.

Mr. Hackbert: I can refer to them by number, or I can give the instruction as tendered to Mrs. Bretsch and she can copy it into the record at this point.

The Court: You handle it the way you want to.

Mr. Peters: If you designate it, that is all that is necessary.

Mr. Hackbert: We object to the failure of the
558 Court to give defendant's tendered instruction No. 4.

We object to the failure of the Court to give defendant's tendered instruction No. 6.

The Court: The requests are refused, and the objections are overruled.

I would suggest that counsel be available, if any question should come up.

I will say this, that if they should ask for instructions again, I have on occasion sent the record, the disk, to the jury, with certain admonitions: One, that they should not play it over more than twice without special permission from the Court; two, that they should listen to it completely, and not in part; and, three, that they should all listen and nobody should talk or comment during the reading back of the disk.

Is that agreeable to counsel?

Mr. Hackbert: In other words, there is no particular instruction that is to be singled out; they must hear them all?

The Court: That is right. If they say they again request instructions, and only in that event, they are told they can have the disk and the record player to take
559 to the jury room, and that they can listen to the instructions under those admonitions, by observing those admonitions.

Mr. Hackbert: Your Honor doesn't have the practice of giving them any additional instructions?

The Court: No.

Mr. Peters: They just listen to what has been given on the record. I see no objection; do you?

Mr. Hackbert: No.

Mr. Waitkus: No; we have no objection.

The Court: All right.

* * * * *

17 And afterwards, towit, on the 27th day of September, 1955, the following proceedings were had, towit:

Come now the parties herein and trial is resumed and defendant presents further evidence, concludes and rests. Both sides rest. And now at the conclusion of all the evidence, defendant files motion for directed verdict, which motion is denied with reservations, and which motion reads in the words and figures following, towit:

18 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1466) * *

MOTION FOR DIRECTED VERDICT.

Comes now the defendant, at the close of all of the evidence, and now moves the Court to direct the jury to return a verdict for the defendant, for each of the following separate and several reasons:

a. There is no evidence here from which the jury may find that the defendant was, at the time of his claimed injuries engaged in any activity within The Federal Employers Liability Act, 45 U. S. C. A., Section 51, et seq.

b. There is no evidence in this cause from which the jury may infer that any negligent act of the defendant proximately caused any injury or injuries to the plaintiff in whole or in part.

c. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish the plaintiff a reasonably safe place and surroundings in which to work and perform his duties.

d. There is no evidence in this cause from which the jury may infer that the defendant negligently permitted pebbles, cinders, gravel and grease to accumulate on the bar floor of Shanty #100.

e. There is no evidence in this cause from which the jury may infer that the defendant negligently ordered the plaintiff to work in crowded and cramped quarters.

f. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to keep and maintain the floor of Shanty #100 in a clean condition.

g. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to inspect the premises of Shanty #100.

h. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to give and furnish sufficient help to assist the plaintiff as timekeeper, necessitating long, arduous hours of employment under conditions existing as heretofore mentioned, in Shanty #100.

19 i. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish and maintain sufficient and adequate facilities in Shanty #100.

j. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish necessary adding machines or computing appliances.

k. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish sufficient working space.

l. There is no evidence in this cause from which the jury may infer that the defendant negligently permitted numerous employees to congregate in said Shanty #100.

m. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to place any sign reading "No loitering" in Shanty #100.

n. There is no evidence in this cause from which the jury may infer that the defendant negligently failed to furnish this plaintiff with a safe place where his adding machine could be placed for safekeeping.

o. There is no evidence in this cause from which the jury may infer that the defendant employer negligently failed to use reasonable care in furnishing the plaintiff a safe place in which to work.

p. There is no evidence in this cause from which the jury may infer that the injuries which plaintiff claims was proximately caused by any act or omission of the defendant.

q. The evidence in this cause conclusively points to the fact that the sole proximate cause of plaintiff's injuries was his own act or acts.

r. There is no evidence in this cause from which the jury may infer any duty on the part of the defendant which was negligently broken by the defendant and caused in whole or in part any of plaintiff's claimed injuries.

Dated: 9/27/1955.

/s/ Glenn D. Peters,
5246 Hohman Avenue,
Hammond, Indiana,

/s/ Harlan L. Hackbert,
208 S. LaSalle St.,
Chicago 4, Illinois,
Attorneys for Defendant, Elgin, Joliet and Eastern Railway Co.

* * * * *

20 And afterwards, towit, on the 28th day of September, 1955, the following proceedings were had, towit: Come now the parties again into open court and comes also the jury and in the presence of both parties to this action returns its verdict in the words and figures following, towit:

We, the jury, find for the plaintiff and assess the amount of his damages in the sum of Fifteen Thousand Dollars ($15,000.00).

s/ Peter Berthold,
Foreman of the Jury.

And now at the request of the court the jury is polled. Comes now the defendant and upon request of said defendant, the Clerk is directed to withhold entry of judgment for 10 days. Verdict is ordered filed.

21 And afterwards, towit, on the 7th day of October, 1955 the following proceedings were had, towit:

Comes now the defendant and files motion for judgment notwithstanding the jury verdict, which motion reads in the words and figures following, towit:

22 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—1466) * *

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

(Filed Oct. 7, 1955. Kenneth Lackey, Clerk.)

Now comes the defendant, Elgin, Joliet and Eastern Railway Company, a corporation, by Glenn D. Peters and Harlan L. Hackbert, its attorneys, and moves the Court to set aside the verdict of the jury and to enter judgment for the defendant notwithstanding the verdict of the jury, for the reasons set forth in the defendant's motion for directed verdict, as renewed at the close of all the evidence and for the following reasons:

(1) There is no competent and substantial evidence of probative value that the defendant or any of its employees other than plaintiff were guilty of any act of negligence alleged in plaintiff's complaint and submitted to the jury under the instructions of the Court.

(2) There is no competent and substantial evidence of probative value that any act of negligence on the part of the defendant or of any of its employees other than the plaintiff alleged in plaintiff's complaint and submitted to the jury under the instructions of the Court was the proximate cause of any injuries sustained by the plaintiff.

(3) The evidence affirmatively establishes that the conduct of the plaintiff was the sole proximate cause of any injuries sustained by him.

(4) There is no competent and substantial evidence of probative value that at the time of the alleged accident plaintiff was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

/s/ Glenn D. Peters,
5246 Hohman Avenue,
Hammond, Indiana,

/s/ Harlan L. Hackbert,
208 S. LaSalle Street,
Chicago, Illinois,
Attorneys for Defendant.

* * * * *

23 And afterwards, towit, on the 4th day of January, 1956, the following proceedings were had, towit:

And now the court enters memorandum of decision on motion for judgment notwithstanding the verdict, which motion is granted by the court and which memorandum reads in the words and figures following, towit:

24 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—1466) * *

MEMORANDUM OF DECISION OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

(Filed Jan. 4, 1956. Kenneth Lackey, Clerk.)

The plaintiff and his co-worker, George Marjanian, were the only people present on the evening of December 13, 1951, when the plaintiff claims he injured his head in Building 100 situated in the Kirk yard maintained by the defendant. I have studied the transcript of the testimony of these two witnesses. While the evidence, as showed by this testimony, is that the floor of Building 100 was dirty on the evening in question and that frequently there were quantities of cinders, pebbles, grease and tar on the floor, there is no direct competent evidence that there was any such foreign substance under or in front of the desk where the plaintiff says he received his injury. At best it can only be inferred. The witness Marjanian did not actually see what happened at the time the plaintiff says he hurt his head. The plaintiff testified he "must have slipped" while bending to put an adding machine under the desk. It is claimed that he thereby hit his head on the desk, and that this caused the injuries complained of.

I have determined that this evidence is not sufficient upon which the verdict can stand. To find that the plaintiff injured his head by slipping because of a foreign
25 substance on the floor, we must infer, first, that there was such a substance at the place where the plaintiff was bending under the desk and, second, that he actually slipped because of such condition. Thus, the finding, essential for the support of the verdict, is based upon one inference which rests in turn upon another inference. A

finding arrived at in this manner is the result of guesswork and conjecture. It is not a legitimate finding.

Another reason advanced by counsel for granting the motion is the insufficiency of the evidence to show that the condition of the floor was due to defendant's negligence. I do not feel it necessary to determine this question in view of my conclusion with regard to the speculation of the cause of plaintiff's injury. I will say, however, that I think the question would be serious one if it were reached.

Order and Judgment.

The motion of the defendant for judgment notwithstanding the verdict is granted.

It is ordered, adjudged, and decreed that the plaintiff take nothing by his complaint and that the defendant have judgment against the plaintiff and recover from said plaintiff its costs taxed at $.....

/s/ Luther M. Swygert,
Judge.

Enter: January 4, 1956,
Hammond, Indiana.

26 And afterwards, towit, on the 4th day of January, 1956, the following proceedings were had, towit:

And now the Clerk enters judgment in accordance with the finding of the court, which judgment reads in the words and figures following, towit:

It is ordered that the plaintiff take nothing and that the defendant have judgment against the plaintiff and recover from said plaintiff its costs.

• • • • •

30 And afterwards, towit, on the 1st day of February, 1956, the following proceedings were had, towit:

Comes now the plaintiff and files notice of appeal, with statement under Rule 10(b) of the Rules for U. S. Court of Appeals, which notice of appeal and statement read in the words and figures following, towit:

31 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Indiana,

Hammond Division.

Clairon Vern Gibson, *Plaintiff*, *vs.* Elgin, Joliet and Eastern Railway Company, *Defendant.*	Civil Action, Cause No. 1466.

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73b.

(Filed Feb. 1, 1956. Kenneth Lackey, Clerk.)

Notice is hereby given that Clairon Vern Gibson, plaintiff, above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 4th day of January, 1956.

/s/ Justin Waitkus,
Justin Waitkus,
Attorney for Plaintiff, Clairon Vern Gibson.

Sackett, Pyatt & Waitkus,
569 Broadway,
Gary, Lake County, Indiana,
Of Counsel.

32 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1466) * *

STATEMENT UNDER RULE 10 (b) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

(Filed Feb. 1, 1956. Kenneth Lackey, Clerk.)

1. This action was filed in the United States District Court for the Northern District of Indiana, Hammond Division, on April 16, 1953.

2. The plaintiff is Clairon Vern Gibson and his attorney is Justin Waitkus, 569 Broadway, Gary, Indiana.

3. The defendant is the Elgin, Joliet and Eastern Railway Company, an Illinois corporation.

4. The defendant filed answer on June 6, 1953.

5. The action was tried by a jury on September 19, 20, 21, 26, 27 and 28, 1955.

6. The jury returned a verdict for the plaintiff against the defendant in the sum of Fifteen Thousand Dollars ($15,000.00) on September 28, 1955. The jury was then polled.

7. On October 7, 1955, the defendant filed a Motion for Judgment notwithstanding the jury verdict.

8. On November 22, 1955, hearing was had on defendant's Motion for Judgment notwithstanding the verdict. The matter was taken under advisement by Judge Luther M. Swygert.

9. On January 4, 1956, the Judge filed a memorandum of his decision regarding the defendant's Motion for Judgment notwithstanding the verdict. The Motion for Judgment notwithstanding the verdict was granted on January 4, 1956.

10. Judgment was entered for the defendant on January 4, 1956.

33 11. On January 17, 1956, plaintiff filed Affidavit for leave to appeal in forma pauperis.

12. On January 24, 1956, defendant filed objections to said Affidavit, and after hearing evidence and arguments of counsel, the Court granted leave to appeal in forma pauperis insofar as the U. S. District Clerk's fees and posting of appeal bond were concerned. In all other re-

spects, leave was denied without prejudice to the plaintiff to pursue his request in the Court of Appeals insofar as any procedure in that Court was concerned.

13. Plaintiff, Clairon Vern Gibson, filed his Notice of Appeal on February 1, 1956.

/s/ Justin Waitkus,
Justin Waitkus,
Attorney for Plaintiff,
Clairon Vern Gibson.

Sackett, Pyatt & Waitkus,
569 Broadway,
Gary, Lake County, Indiana,
Of Counsel.

• • • • •

40 And afterwards, towit, on the 5th day of March, 1956, the following proceedings were had, towit:

And now the court enters order extending time for filing record of appeal, which order reads in the words and figures following, towit:

41 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1466) • •

ORDER FOR EXTENDING TIME FOR FILING THE RECORD OF APPEAL.

(Filed Mar. 5, 1956. Kenneth Lackey, Clerk.)

Upon application of the plaintiff, Clairon Vern Gibson, in the above entitled cause, by his attorney of record, Justin Waitkus, and for good cause shown, it is by the court this 5th day of March, 1956, ordered that the time for filing the record of appeal and docketing the proceedings in this cause on appeal be, and the same is hereby extended to and including the 30th day of April, 1956.

Luther M. Swygert,
Judge.

42 United States of America,
Northern District of Indiana. } ss.

I, Kenneth Lackey, Clerk of the United States District Court for the Northern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of the original.

1. Complaint filed April 16, 1953.
2. Answer filed June 16, 1953.
3. Trial proceedings September 19, 1955 to September 28, 1955.
4. Motion for directed verdict at close of plaintiff's evidence, filed September 26, 1955.
5. Motion for directed verdict at close of all the evidence, filed September 27, 1955.
6. Jury verdict entered September 28, 1955.
7. Motion for judgment notwithstanding the verdict, filed October 7, 1955.
8. Memorandum of decision of motion for judgment notwithstanding the verdict, filed January 4, 1956.
9. Judgment entered January 4, 1956.
10. Affidavit for leave to appeal in forma pauperis, filed January 17, 1956.
11. Order on affidavit for leave to appeal in forma pauperis, entered January 24, 1956.
12. Notice of appeal filed February 1, 1956.
13. Statement under Rule 10(b), of the Rules of U. S. Court of Appeals, filed February 1, 1956.
14. Designation of record filed February 7, 1956.
15. Motion to submit original exhibits.
16. Order granting permission to forward original exhibits, entered February 7, 1956.
17. Motion to extend time for filing record of appeal, filed Mar. 5, 1956.
18. Order extending time to file record on appeal, filed Mar. 5, 1956.

Now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Hammond, Indiana, this 24th day of April, A.D. 1956.

Kenneth Lackey,
Clerk,
By Jean Erickson,
Deputy.

(Seal)

No. 565

OCT 21 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner,

vs.

CLAIRON VERN GIBSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HARLAN L. HACKBERT,
208 South LaSalle Street,
Chicago 4, Illinois

GLENN D. PETERS,
Hammond, Indiana
Attorneys for Petitioner.

CHICAGO LAW PRINTING CORPORATION, 189 W. MADISON, CHICAGO - FRANKLIN 2-6521

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vs.

CLAIRON VERN GIBSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS BELOW.

The majority and dissenting opinions, both upon the original hearing and upon petition for rehearing are printed as the Appendix to this Petition. The opinions are officially reported at 246 F. 2d 843.

JURISDICTIONAL STATEMENT.

The judgment and order of the Court of Appeals was entered June 25, 1957 (R. 315). A petition for rehearing, filed in apt time was denied August 20, 1957 (R. 321) and the judgment became final on that date.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, providing for review by this Court by certiorari of decisions of a Court of Appeals.

QUESTIONS PRESENTED.

The District Judge set aside the verdict of the jury and entered judgment for the defendant notwithstanding the verdict, holding that "the finding, essential for support of the verdict, is based upon one inference which rests in turn upon another inference * * * [and] * * * is the result of guesswork and conjecture." (R. 298-9) All three of the judges comprising the panel which heard and decided this case in the Court of Appeals agreed with this appraisal of the evidence by the District Judge (App. A-6); they agreed that the evidence "is, no doubt, speculation" (App. A-5) and would not sustain a verdict in an ordinary action for negligence. But in a bitterly-worded difference of opinion, both on initial hearing and on petition for rehearing, the majority, concluding that "a majority of the Supreme Court, as presently constituted, regards F.E.L.A. cases as something apart and different from other negligence cases, and that a different rule or test applies" in determining the probative force of evidence, held that in an F.E.L.A. case "speculation, conjecture and possibilities suffice to support a jury verdict" (App. A-6) and remanded

the cause with directions to enter judgment on the verdict (R. 315). Judge Schnackenberg, dissenting, drew the clear-cut distinction between "speculation and conjecture *by witnesses* in testifying" and "speculation and conjecture *by a jury in drawing inferences from the evidence heard on a trial.*" (The judge's emphasis.) The sharp division of the court below presents the following questions:

1. Where the finding essential to support a verdict is based upon one inference which rests in turn upon another inference and is insufficient to sustain a verdict in an ordinary civil action (cf. *Sickles* v. *Graybar Electric Co.*, (C.A. 7), 219 F. 2d 847, cert. den. 350 U.S. 827, 905), may the verdict be sustained in an action under the Federal Employers' Liability Act?

2. Is mere uncorroborated hearsay evidence, which is not sufficient to sustain a finding in ordinary civil litigation, "substantial evidence" to support a verdict in an action under the Federal Employers' Liability Act?

3. Does this Court's holding in *Lavender* v. *Kurn*, 327 U.S. 645, that "whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of" the jury in "choosing what seems to them to be the most reasonable inference" warrant the sustaining of a verdict on the speculation and conjecture by a witness in testifying to his conclusions?

4. Do the recent decisions of this Court, following *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, that "under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion" of the jury, sustain the holding that "jury verdicts under the F.E.L.A. can be permitted to stand even though based solely on speculation," namely the testimony of a witness as to what "must have happened"?

5. Is the standard or test of the probative value of evidence different in F.E.L.A. cases than in other civil litigation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

No constitutional provision is involved and, except for the fact that the action is brought, and the jurisdiction of the District Court was invoked, under the Federal Employers' Liability Act, Title 45, United States Code, Section 51 *et seq.*, no statute is involved.

STATEMENT OF THE CASE.

This is an action under the Federal Employers' Liability Act (45 U.S.C. §51) for personal injuries alleged to have been sustained by the plaintiff as he was putting a borrowed adding machine underneath his desk. The complaint charged (R. 5):

> "That when the plaintiff started back from under his desk his foot slipped and gave way on some of the gravel, pebbles, cinders and grease on the floor; that in attempting to catch his balance his head came up suddenly and hit the bottom edge of the desk drawer with great force."

The jury returned a verdict of $15,000 in favor of the plaintiff.

The District Judge in his memorandum opinion sustaining defendant's motion for judgment notwithstanding the verdict and the Court of Appeals in its opinions considered only two items of evidence as relied upon to sustain the verdict. The first was the following question and answer of plaintiff's witness, Marjanian, a fellow employee working with plaintiff on the night of the alleged occurrence (R. 27):

> "Q. Can you tell us whether anything happened that was unusual at that time?
>
> "A. Well, he put the adding machine under his desk. I was putting my work away. All of a sudden I heard a noise; I looked over there; I saw Mr. Gibson holding his head. I asked him what the reason was, what happened. He didn't say anything to me for about two minutes. Then all of a sudden he told me to take his key, and start his car, which I did, let his car run; I came back in, and he started to tell me that he slipped under his desk and hit his head

under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time."

The second was the following testimony of the plaintiff (R. 87):

"Q. What happened to you after you got the adding machine in there, if anything?

"A. Well, it must have been as I was backing out, because I had a terrific bump on my head, and I must have slipped.

"Mr. Hackbert: I move to strike out 'I must have slipped,' if the Court please. The question is what happened, not what he speculates or thinks must have happened.

"The Court: Well, I will overrule."

Upon motion for judgment notwithstanding the verdict, the District Judge held (R. 298):

"I have determined that this evidence is not sufficient upon which the verdict can stand. To find that the plaintiff injured his head by slipping because of a foreign substance on the floor, we must infer, first, that there was such a substance at the place where the plaintiff was bending under the desk and, second, that he actually slipped because of such condition. Thus, the finding, essential for the support of the verdict, is based upon one inference which rests in turn upon another inference. A finding arrived at in this manner is the result of guesswork and conjecture. It is not a legitimate finding."

He held it was unnecessary to pass on defendant's remaining contention as to the insufficiency of the evidence to show defendant's negligence, but indicated the question was a "serious one if reached." (R. 299) The Court entered judgment for the defendant and this appeal followed.

The majority of the Court of Appeals held that Marjanian's statement was "undoubtedly hearsay" and not admissible under the *res gestae* rule, but that since it was received without objection or motion to strike, it must be "considered and given its natural probative effect." Judge Schnackenberg, dissenting, pointed out that

> "as Marjanian's answer includes his voluntary contemporaneous admission that he could not tell exactly what plaintiff said, his testimony, if relied on to prove employer negligence, is eviscerated." (App. A-11)

All the the members of the Court of Appeals agreed that:

> "Plaintiff's conclusion as to what 'must' have happened, that he 'must have slipped,' is, not doubt, speculation." (App. A-5)

and:

> "We agree with the District Judge that the finding essential to support this verdict 'is based upon one inference which rests in turn upon another inference.'" (App. A-6)

The majority of the court (per Grubb, D. J.), citing *Lavender* v. *Kurn*, 327 U.S. 645, 653; *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506, 508; *Webb* v. *Illinois Central R. Co.*, 325 U.S. 512, 515; and *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, concluded that

> "The majority of the United States Supreme Court now take the position that jury verdicts under the F.E.L.A. can be permitted to stand even though based solely on speculation." (App. A-6)

Judge Schnackenberg dissenting, pointed out that *Lavender* v. *Kurn, supra,*

> "relates not to speculation and conjecture *by witnesses* in testifying, but relates to speculation and conjecture *by a jury in drawing inferences from the evidence heard on a trial.*" (App. A-7; emphasis his)

On petition for rehearing, the majority (per Duffy, C. J.) "[b]owing to the extreme position taken by a majority of the Supreme Court" and deeming it their duty "to follow the law as laid down by the Supreme Court, even if the interpretation given does violence to our preconceived ideas of what the law is" (App. A-17) denied rehearing, Judge Schnackenberg again dissenting. (App. A-17)

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided an important question of federal law in a way in conflict with applicable decisions of this Court.

2. The Court of Appeals has so far departed from the accepted and usual rule as to the scope of judicial review as to call for an exercise of this Court's power of supervision.

3. In holding that a verdict in an action under the Federal Employers' Liability Act may be sustained on evidence which is merely the speculation of a witness, the Court of Appeals has decided an important question of federal law in a way in conflict with the applicable decisions of this Court in *Moore* v. *Chesapeake & O. Ry. Co.*, 341 U.S. 573; *Galloway* v. *United States*, 319 U.S. 372; and *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, and in conflict with decisions of the Courts of Appeal for the First, Fifth and Seventh Circuits; and the conflict thus created should be settled by this Court.

ARGUMENT.

In a series of opinions at the last term commencing with *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, this Court laid down the standard or test of the sufficiency of the evidence to sustain a verdict under the Federal Employers' Liability Act:

> "Under this statute the test of a jury case is simply whether with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Throughout the opinions the phrase "*with reason*" is repeated. Mr. Justice Harlan, in his dissenting opinion in the *Rogers* case, states the standard somewhat more fully:

> "evidence sufficient to enable a *reasoning* man to infer both negligence and causation by *reasoning from the evidence*." (352 U.S. at 563)

All of the judges comprising the Court of Appeals in the instant case agreed that the only two items of evidence relied upon to sustain the jury's verdict were purely speculative, and would not *with reason* sustain a verdict in an ordinary civil action for negligence; however, the majority of the Court (Duffy, Chief Judge, and Grubb, District Judge) concluded that under recent decisions of this Court

> "jury verdicts under the F.E.L.A. can be permitted to stand even though based solely on speculation."

We submit that the majority opinion below misconceives the holdings of this Court in the *Rogers* and subsequent cases, that they have confused the distinction between the right *of a jury* to employ "a measure of speculation and conjecture" in choosing between inferences permitted by

direct or circumstantial evidence of the fact itself (see *Lavender* v. *Kurn*, 327 U.S. 645) and the asserted right *of a witness* to speculate as to the fact, and that they failed to follow the repeated command of this Court that even in F.E.L.A. cases

> "the essential requirement is that mere speculation be not allowed to duty for probative facts."

See *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 577; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 32; *Galloway* v. *United States*, 319 U.S. 372, 395.

We are not concerned here with the relative weight of conflicting inferences which might be drawn from direct evidence or circumstantial evidence of the fact itself, the issue which has so frequently sharply divided this Court at the last term. The single question presented here, to paraphrase the language of Mr. Justice Frankfurter in *McBride* v. *Toledo Terminal R. Co.*, 352 U.S. ....., is whether the court below

> "applied the wrong legal standards to the particular facts before it."

Unlike the cases relied upon by the majority below, in this record of 523 pages of testimony there is neither direct nor circumstantial evidence of a condition claimed to be due to the employer's negligence and to have caused the injury, such as the mail hook in *Lavender* v. *Kurn*, 327 U.S. 645, the embedded cinder in *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, the inadequate tool in *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, the loose gravel in the narrow space between the fire and the passing train in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500. Here there was only the dubious recollection of a witness as to what *might* have been told him (hearsay with "its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact" [Marshall, C.J., in *Queen* v. *Hepburn*,

7 Cranch, 290, 296]) and the plaintiff's reconstruction of what "*must have happened*" ("speculation [which] cannot supply the place of proof" [Minton J., in *Moore* v. *Chesapeake & O. Ry. Co.*, 341 U.S. 573, 577]) to sustain, first, the inference that there were, in fact, pebbles, grease or other foreign matter on the floor under plaintiff's desk; second, the inference that the plaintiff, in fact, slipped on any such foreign matter; and, third, the inference that any such foreign matter was caused or permitted to be there because of the negligence of some employee other than the plaintiff himself. Such piling of inferences, one upon the other, will not sustain a verdict; "This would be speculation run riot." *Moore* v. *Chesapeake & O. Ry. Co., supra.* None of the cases relied upon by the majority below sustain their conclusion that the speculation *of a witness* as to what *might have been* told him or what *must have* happened (which admittedly would not sustain a verdict in any other action) will sustain a verdict in an F.E.L.A. action.

Nor does the reference in the *Rogers* case to

> "the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action"

warrant the conclusion of the majority below that the oft-repeated standard that "mere speculation be not allowed to duty for probative facts" is now to be abandoned in F.E.L.A. cases. This Court was speaking of differences in the duty of the railroad employer, not of differences in proving a breach of that duty. This case involves none of the "special features" such as the absolute duties imposed by the Safety Appliance or Boiler Inspection Acts, the abolition of the defense of assumption of risk, the restricted use of the defense of contributory negligence, the broader concept of causal relation in the phrase "resulting in whole or in part" rather than proximate cause which im-

poses a "far more drastic duty" than "the common law duty of the master to his servant." Here we have only the simple duty to use reasonable care to keep the floor or other working area reasonably clean—a duty no more drastic and no different than that which confronts storekeepers (*Stephens* v. *Sears Roebuck & Co.* (C.A. 7) 212 F. 2d 260) or common carriers (*Reuter* v. *Eastern Air Lines* (C.A. 5), 226 F. 2d 443). In those cases evidence of the same speculative character was held insufficient to sustain a verdict. In the *Reuter* case the plaintiff's conclusion that she must have caught her heel on a metal strip on the airplane step was held

> "no more than a conclusion reached by her of what probably happened, a mere afterthought"

and was not "capable of supporting, with reason, the conclusion expressed in the verdict." (226 F. 2d at 446) In the *Stephens* case, the plaintiff's testimony that "she *seemed* to hit a greasy or slick spot" was held insufficient to sustain a verdict. In *Sickles* v. *Graybar Electric Co.* (C.A. 7), 219 F. 2d 847, the court below held that a verdict cannot be based on one inference which in turn rests upon another inference. *Galloway* v. *United States*, 219 U.S. 372, announces the same rule, and *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, and *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, apply in F.E.L.A. cases the "essential requirement" that

> "mere speculation be not allowed to do duty for probative facts"

And in *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, at 229, followed in *United States* v. *Krumsiek* (C.A. 1), 111 F. 2d 74, at 78, this Court defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and held that

"Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

The majority of the court below, with apparent reluctance, concluded that these well-settled principles by which the probative value of evidence is to be tested are no longer applicable in F.E.L.A. cases. We submit that they were wrong in their construction of recent decisions of this Court, wrong in their refusal to follow the applicable decisions of this Court, and wrong in the conflict which they have created between this decision and prior decisions in the court below and in other circuits. The importance of the *standard* by which the probative value of the evidence in an F.E.L.A. case is to be determined is a compelling reason for the allowance of a writ of certiorari to correct the misconception of the court below and to re-establish the repeated admonition of this Court that

"mere speculation be not allowed to do duty for probative facts."

Respectfully submitted,

HARLAN L. HACKBERT,
GLENN D. PETERS,
Attorneys for Petitioner.

APPENDIX.

OPINIONS BELOW.

CLAIRON VERN GIBSON,
Plaintiff-Appellant,

v.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 25, 1957

Before DUFFY, *Chief Judge* SCHNACKENBERG, *Circuit Judge,* and GRUBB, *District Judge.*

GRUBB, *District Judge.* This is an action under the F.E.L.A. to recover damages for personal injuries. Plaintiff was employed by the defendant as a timekeeper. His duties, in addition to keeping time, included checking crews, signing up new employees and making out accident reports. He and George Marjanian, another timekeeper, worked in a building near the Kirk Yard. The interior of this building had a bare wooden floor. About the exterior of the building there were cinders. At one time there had been a floor mat or foot scraper at the entrance to the building. The scraper broke off and was never replaced. At the time of the accident there was no door mat at the entrance. Plaintiff worked at a desk, around which, from time to time, applicants for employment and employees came on business. These men brought in dirt, cinders, pebbles, and grease making the floor dirty and slippery.

On the evening of December 12, 1951, plaintiff and Marjanian were working overtime to get out a payroll. Marjanian asked plaintiff to put an adding machine, which Marjanian had borrowed, under plaintiff's desk to avoid its being damaged by truck drivers in the morning. Plaintiff had done this on other occasions. Plaintiff in putting the adding machine under his desk, struck his head against the edge of the desk.

Plaintiff's testimony was, "it must have been as I was backing out, because I had a terrific bump on my head, and I must have slipped." The motion to strike this as speculative was overruled. Plaintiff continued, "I lost my balance somehow and bumped my head on the edge of the drawer as I was getting out from under the desk. As I was getting out, I say I don't know whether I lost my balance, or not."

Marjanian testified that he heard a noise, looked over and saw plaintiff holding his head. He asked plaintiff what had happened. Plaintiff didn't say anything for about two minutes; then he told Marjanian to take his key and start his car, which Marjanian did. Marjanian came back in and plaintiff "started to tell me that he slipped under his desk and hit his head under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time."

When being cross-examined with reference to the testimony given on his deposition to the effect that he had shoved the adding machine under the desk, and when he backed out, he didn't back out far enough, and when he lifted up, he cracked his head on the top of the desk drawer, plaintiff testified, "all I do know and do remember is that in backing out in that stooped position my one foot must have slipped, and, catching myself, I must have

straightened up, and then I banged my head. . . ." He was unable to tell which foot slipped or what it slipped on. "I don't remember what it slipped on, other than just grime on the floor or maybe grease."

Plaintiff's wife testified that on arriving home that night, plaintiff's trousers, around the cuff and leg "there seemed to be a grease or something at least foreign there to what his clothes normally were." She continued to testify that there was a greasy streak down the front of his leg, probably the left leg and that it looked like a streak of grease.

Sometime later, plaintiff commenced to have symptoms. Ultimately the diagnosis of chronic subdural hydroma associated with cerebral atrophy was made.

Defendant made a motion for a directed verdict. The court reserved its ruling but submitted the case to the jury which returned the verdict in favor of the plaintiff. Thereafter, defendant's motion for judgment, notwithstanding the verdict, was granted. The Trial Court stated:

> "While the evidence, as showed (*sic*) by this testimony, is that the floor of Building 100 was dirty on the evening in question and that frequently there were quantities of cinders, pebbles, grease and tar on the floor, there is no direct competent evidence that there was any such foreign substance under or in front of the desk where the plaintiff says he received his injury. At best it can only be inferred."

He pointed out that plaintiff testified that "he must have slipped."

The Trial Court further stated:

> "To find that the plaintiff injured his head by slipping because of a foreign substance on the floor, we must infer, first, that there was such a substance at the place where the plaintiff was bending under the

> desk and, second, that he actually slipped because of such condition. Thus, the finding, essential for the support of the verdict, is based upon one inference which rests in turn upon another inference."

The Trial Court added that it was unnecessary to pass upon the additional ground urged that the evidence was insufficient to show that the condition of the floor was due to defendant's negligence. "I will say, however, that I think the question would be serious (*sic*) one if it were reached."

Marjanian's testimony as to what the plaintiff told him was undoubtedly hearsay but it was not objected to and no motion to strike was made. The court is of the opinion that no basis was laid for the receipt of that testimony as *res gestae*. However, the rule with reference to hearsay testimony received without objection is that it is to be considered and given its natural probative effect.

In *Wigmore on Evidence*, Sec. 18, the author quotes from *Diaz* v. *United States*, 223 U. S. 442, 450 (1911):

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible."

Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, 131 (1919); *The Sac and Fox Indians*, 220 U.S. 481 (1910).

Wigmore further adds that failure to make an objection is an implied waiver; that once admitted, the evidence is in the case for what it is worth.

> "Hearsay evidence admitted without objection may be regarded as sufficient to establish a fact in controversy."
> 20 Am. Jur., *Evidence*, Sec. 1185.

> ". . . hearsay evidence, in the absence of objections to its admission, was properly considered by the jury, . . . that the weight to be given to such testimony in view of the attempt made to discredit it was also a question for the jury, . . . and that it should not be disregarded by the Court on this review, . . ."
> *Byars* v. *United States*, 238 F.2d 82, 83 (C.A. 6, 1956)

Plaintiff's conclusion as to what "must" have happened, that he "must have slipped", is, no doubt, speculation. However, with reference to speculation in F.E.L.A. cases, the United States Supreme Court stated:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Lavender, Administrator, v. *Kurn et al.*, 327 U.S. 645, 653, cited with approval in *Webb* v. *Illinois Central R. Co.*, 325 U.S. 512, 515 (Footnote).

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, the court stated at page 506:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

And, at page 508:

> "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

In *Webb* v. *Illinois Central R. Co., supra,* the court added: (Page 516)

> "'. . . It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. . . .'"

A similar position is taken by the majority of the court in *Ferguson* v. *Moore-McCormack Lines,* 352 U.S. 521. The dissenting opinion by Mr. Justice Frankfurter and the statistics and material there set forth indicate the attitude of the court in F.E.L.A. cases. Mr. Justice Harlan in his dissenting opinion in that case, states at page 564:

> ". . . And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts. However, in judging these cases, the Court appears to me to have departed from these long-established standards, for, as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts. . . ."

It will be seen from these three cases decided in 1957 that the majority of the United States Supreme Court now take the position that jury verdicts under the F.E.L.A. can be permitted to stand even though based solely on speculation.

We agree with the District Judge that the finding essential to support this verdict "is based upon one inference which rests in turn upon another inference." Under the recent decisions of the United States Supreme Court in F.E.L.A. cases, speculation, conjecture and possibilities suffice to support a jury verdict.

It should be pointed out that the Trial Court's decision on the motion for judgment, notwithstanding the verdict, was handed down January 4, 1956, a year before the recent decisions of the United States Supreme Court on this subject, cited herein.

For the foregoing reasons, the judgment of the District Court is reversed and the cause remanded with directions to vacate the order granting judgment, notwithstanding the verdict, and to enter judgment on the verdict.

SCHNACKENBERG, *Circuit Judge*, dissenting.

While frankly conceding that "plaintiff's conclusion as to what 'must' have happened, that he 'must have slipped', is, no doubt, speculation", and that the verdict in this case "is based upon one inference which rests in turn upon another inference", Judge Grubb, in stating the pivotal ground of his decision, makes this startling assertion:

> "Under the recent decisions of the United States Supreme Court in F.E.L.A. cases, speculation, conjecture and possibilities suffice to support a jury verdict."

Inasmuch as he applies this utterance *to the testimony of witnesses and limits it to Federal Employer Liability Act cases, sui generis,* it constitutes judicial heresy without support in the decisions of the Supreme Court, recent or otherwise. He cites no case in support of this statement. He has obviously misled himself by his reading of the decision in *Lavender* v. *Kurn,* 327 U.S. 645, which he fails to notice relates not to speculation and conjecture *by witnesses* in testifying, but relates to speculation and conjecture *by a jury in drawing inferences from the evidence heard on a trial.* The court, at 653, said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts

> are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In the present case it is the witnesses themselves who are doing the speculating and conjecturing, as hereinafter demonstrated.

Judge Grubb's opinion would support the verdict despite "a complete absence of probative facts" showing employer negligence.

The majority opinion is the result of what my colleagues feel is the irresistible compulsion of recent Supreme Court decisions in Federal Employers Liability Act cases. I do not read those cases as requiring a reversal of the district court's action. The Supreme Court has disclaimed any intention of making a railroad an insurer of its employees. *Wilkerson* v. *McCarthy,* 336 U.S. 53, 62.

Whether the district judge erred in entering a judgment notwithstanding the verdict in favor of the plaintiff depends on whether the proofs in this record justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury for which plaintiff seeks damages. *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 506. Judicial appraisal of the proofs to

determine whether a jury question is presented is narrowly limited to the single inquiry whether with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury. The statute imposes liability to pay damages for injury due in whole or in part to the employer's negligence. *Ibid.*, 507.

There is no evidence in the record that, on the evening when plaintiff bumped his head on his desk, there were any cinders, pebbles, grease or other foreign matter on the floor. Even if we waive the hearsay evidence rule in order to support plaintiff's case, we can find no evidence, substantial, small, slight or even perceptible, of the presence of any foreign substance on the floor on the day of the accident.

He testified that, in order to put an adding machine under his desk, he "stooped down" on his "toe-tips, balancing the machine in" his arms as he crawled into the knee opening of the desk, and that, after he got the machine under the desk, he got a bump on his head as he was backing out. He added, "I must have slipped." A motion to strike the latter part of the answer was overruled. He further said, "I lost my balance somehow and bumped my head on the edge of the drawer as I was getting out from under the desk. As I was getting out, I say I don't know whether I lost my balance, or not. Anyway, I got a terrific blow on my head." He further testified he had Mr. Marjanian, who worked at a desk directly facing and touching his desk, "carry my adding machine out to the car, and warm the car up and bring it up to building 100 for me. * * * I finished locking up the building, and then I went out to the car, and I drove him home and then I went home."

He reported the injury to his head about a year later.

Marjanian testified that he handed Brown's adding machine to plaintiff, who put it under his desk; but that he did not see him do it. Marjanian testified that he heard a noise, looked and saw plaintiff holding his head, that plaintiff told him to take his key and start his car which he did—letting his car run. He then testified that he came back and plaintiff "*started to tell me* that he had slipped under his desk and hit his head under his desk; *he told me* he slipped on some cinders or pebbles; *I couldn't tell you exactly what he said at that time.*"

Plaintiff admitted that he had testified at a deposition hearing that, after he got the machine under the desk, he backed up, scooted out and then he did not know how it happened "all I do know and do remember is that in backing out in that stooped position my one foot *must have* slipped, and, catching myself, I *must have* straightened up, and then I banged my head up there and everything went blank;" that he could not tell which foot slipped or "what it slipped on, other than just grime on the floor or maybe grease."

Plaintiff's wife testified that, when he arrived home that night, around the cuffs and legs of his trousers "there seemed to be a grease or something at least foreign". There is no evidence that he did not get the grease on his pants legs on the way home, in his car or elsewhere. Neither plaintiff or Marjanian testified to seeing any grease or other foreign substance on plaintiff's pants legs when he left the office to go home.

The relevant parts of the evidence, most favorable to plaintiff, above referred to, lack probative effect. Obviously, when plaintiff testified that he "must have slipped"

and he "must have straightened up", he was not testifying to facts. He was conjecturing or reasoning *ex post facto* what had occurred. Such statements are not evidence of what actually occurred. They are plaintiff's retrospective opinion of what he thinks occurred. His testimony that he lost his balance "somehow" and bumped his head as he was getting out from under the desk is no proof that any substance on the floor *caused him to slip.* Marjanian testified that a considerable time *after the accident* plaintiff told him that he (plaintiff) slipped on some cinders or pebbles, and, in the same breath, Marjanian added that he could not tell exactly what he said at that time. Of course, whatever Marjanian testified that plaintiff then said to his was hearsay evidence, which, not being objected to, we may consider for what it is worth. But, as Marjanian's answer includes his voluntary contemporaneous admission that he could not tell exactly what plaintiff said, his testimony, if relied on to prove employer negligence, is eviscerated.

Plaintiff testified that he "could not say" what the condition of the floor was on the evening he bumped his head. The record shows that it was the regular custom for janitors to sweep the floor of this office twice daily; about 9:30 A.M. and about 1:30 or 1:45 P.M. There is no evidence that they missed this chore on the day of the accident. Neither plaintiff or Marjanian testified that he saw any cinders, pebbles, grease, dirt or other foreign substance on the floor under or around the desk at the time of the accident or thereafter. This is especially significant in view of Marjanian's testimony that he was present when he heard a noise and saw plaintiff holding his head and he was also there after he (Marjanian) had started plaintiff's car and returned to the office, and plaintiff said that he slipped on some cinders or pebbles. Having heard a

noise accompanying plaintiff's bumping of his head on the desk and having heard plaintiff's later statement that he had slipped on some cinders or pebbles, it is incredible that Marjanian would not have looked at the floor where the accident occurred. Moreover, the absence of any testimony that there was grease on the floor under or near the desk makes irrelevant the testimony of plaintiff's wife that she saw grease on his pants legs when he arrived home after the accident.

The very gist of plaintiff's case is the alleged, but unproved, presence of a foreign matter on the floor under or in front of the desk. The failure to prove the presence of such matter at the time that plaintiff struck his head clearly distinguishes this case from the recent cases of *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, where there was evidence of a large cinder embedded in the roadbed, *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, where the evidence showed that the injured employee was furnished with an inadequate tool, *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, where the evidence showed the exact conditions which created a likelihood that the employee would suffer just such an injury as he did, and *Lavender* v. *Kurn*, 327 U.S. 645, where there was evidence of the existence of a mail hook on the defendant's train.

To paraphrase the language of the court in *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573, at 577 (a case involving a fall from the footboard of an engine), we would have to say—"to sustain plaintiff, one would have to infer from no evidence at all that there was a foreign substance under or around the desk prior to and at the time that plaintiff fell, and then infer that he fell because of the foreign substance. This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway* v. *U.S.*, 319 U.S. 372, 395."

After full deliberation, the district judge entered judgment notwithstanding the verdict. I would affirm.

CLAIRON VERN GIBSON,
Plaintiff-Appellant,
v.
ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

August 20, 1957

ON PETITION FOR REHEARING.

DUFFY, *Chief Judge.* The petition for rehearing embraces in fact, if not in language, the charge of Judge Schnackenberg, in his dissenting opinion, that some of the language of the majority opinion, written by Judge Grubb, constituted "judicial heresy." I do not think the charge is warranted. I think Judge Grubb, in his opinion, was only facing realities.

The point is made that in this record there was no direct affirmative proof of the existence of cinders, grease or other foreign matter on the floor under or in front of plaintiff's desk. But the Supreme Court tells us that such degree of proof is not required in Federal Employers' Liability Act cases. That Court, in a recent case, said: "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 508.

It is our duty, as I see it, to follow the law as laid down by the Supreme Court, even if the interpretation given does violence to our preconceived ideas of what the law is.

If we follow the interpretations of the law as pointed out by our highest court, we should not be accused of judicial heresy. An appraisal, by high authority, of what the majority of the Supreme Court holds to be the rule in Federal Employers' Liability Act cases, is shown by the dissenting opinion of Mr. Justice Harlan in *Ferguson* v. *Moore-McCormick Lines, Inc.*, 352 U.S. 521. The Justice stated at page 563:

> "* * * It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a *reasoning* man to infer both negligence and causation by *reasoning from the evidence*. *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts. However, in judging these cases, the Court appears to me to have departed from these long-established standards, for, as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts. * *" (Emphasis supplied by Justice Harlan)

There can be no doubt that a majority of the Supreme Court, as presently constituted, regards F.E.L.A. cases as something apart and different from other negligence cases, and that a different rule or test applies. In fact, Mr. Justice Brennan, writing the majority opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, stated at page 509: "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this

statutory negligence action that make it significantly different from the ordinary common-law negligence action has required this Court to review a number of cases."

The Supreme Court has decided two cases since the opinion herein was written, which strongly indicate there has been no change in the attitude of the majority as shown by the excerpts hereinbefore quoted.

In *Ringheiser* v. *Chesapeake & Ohio Ry. Co.*, ... U.S. ..... (decided June 10, 1957), the plaintiff had an urgent call of nature, and entered a gondola car loaded with freight to relieve himself. The switching crew, not knowing of plaintiff's presence, bumped the car and some of the freight fell upon plaintiff's leg. The trial judge set aside a jury verdict for the plaintiff. A majority of the Supreme Court found no difficulty in reversing. Mr. Justice Clark in dissenting, said: "Of course, if the majority is saying that the railroad must inspect every loaded car awaiting switching, lest an employee be using it as a toilet, then I could easily understand the action here. * * *"

The other case is *McBride* v. *Toledo Terminal R.R. Co.*, ... U.S. ..... (decided June 24, 1957). The facts are not set forth in the per curiam opinion of the Supreme Court, but the opinion of the Ohio Supreme Court, 140 N.E. 2d 319, indicates that a trainman was climbing down the ladder on a car and slipped. He testified that he didn't know whether he looked at the rungs of the ladder or not. It was night but he could see the last car, three car lengths away. He carried an electric switching lantern, which was hooked over his left arm. He was an experienced trainman. When asked whether he was looking at the rungs of the ladder, he stated: "You can't look down." He admitted that the rungs on all cars are the same distance apart. He stated that he did not miss a rung, he slipped. "He im-

agined there was snow upon the soles. He had observed snow on the rungs of the ladders."

The Ohio Supreme Court upheld the trial judge in granting judgment for the defendant notwithstanding the verdict, pointing out that the plaintiff testified he couldn't see the rungs below and that, therefore, any lack of lighting could not conceivably have been a factor in causing the foot to slip. In that case Mr. Justice Frankfurter filed a dissent, in which he again criticizes the court for granting certiorari in F.E.L.A. cases to review facts. He points out that the Ohio Trial Court, the Ohio Court of Appeals and the Ohio Supreme Court had passed on the case, the latter unanimously; that the only issue was sufficiency of the evidence on causation. He adds:

> "In agreeing to take the case, the Court merely accedes to the natural desire of an unsuccessful plaintiff to have one more court guess whether there were enough facts on which the jury should be allowed to do its guessing."

He further adds:

> "There is no appeal from such abuse of judicial discretion by this Court."

Mr. Justice Burton filed a dissent, agreeing with the Ohio Supreme Court and stating:

> "• • • I believe that petitioner's injuries were not caused, 'in whole or in part,' by the possible inadequacy of the lighting."

Mr. Justice Harlan and Mr. Justice Whittaker dissented for the reason given by Mr. Justice Harlan in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500.

Judge Schnackenberg emphasized in the instant case that plaintiff testified "My one foot must have slipped." In *McBride*, the plaintiff testified he imagined there was snow upon the soles of his shoes.

Bowing to the extreme position taken by a majority of the Supreme Court, I am convinced the decision reached by the majority of the panel in this case is correct, and I am, therefore, voting to deny the petition for rehearing.

SCHNACKENBERG, *Circuit Judge.* Judge Duffy relies on Mr. Justice Harlan's dissenting language in *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 563, where the justice refers to the decisions of the United States Supreme Court in Federal Employers' Liability Act cases and says that that Court seems to imply "that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts." There is no difficulty when that test is applied to the case at bar, because the record before us reveals that there is not a scintilla of evidence of employer's negligence as an element of causation for plaintiff's injury. Hence there is a complete absence of probative facts to support the conclusion reached by the majority opinion in this case.

I favor the granting of a rehearing.

JUDGE GRUBB votes to deny the petition for rehearing.

Reply Brief for Petitioner

Supreme Court of the United States

No 565

Reply Brief for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 565

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner,

vs.

CLAIRON VERN GIBSON,

Respondent.

Reply Brief for Petitioner

Respondent in his brief makes no attempt to defend the theory upon which the majority of the Court of Appeals decided this case, namely, that the test by which the probative weight of evidence is determined is different in an FELA case than in other civil actions. Instead, respondent argues that the evidence was not speculative, amounting to no more than one inference based upon another—an issue which not only the District Judge, but all of the members of the Court of Appeals decided adversely

to him. The issue presented here, upon which the majority of the court below took a position contrary to that announced in decisions of this court, and in decisions of the Courts of Appeal for the First and Fifth Circuits, and to its own prior decisions, is *whether the standard of substantive evidence is different in an FELA case than in ordinary negligence actions.*

In addition to the cases cited in the brief in support of petition, we called this court's attention to the subsequently reported decision of the Court of Appeals for the Second Circuit in *Miller* v. *Farrell*, 247 F. 2d 503. In that case, an action under the Jones Act which is controlled by the same principles which govern FELA actions (*Ferguson* v. *Moore—McCormack Lines, Inc.*, 352 U. S. 521), the court held that where a verdict could only be sustained by "a series of speculations" the District Judge properly entered judgment for the defendant, notwithstanding the verdict. The *Miller* case is squarely in conflict with the holding of the majority of the court below here that under recent decisions of this court a verdict must be sustained even though it is based on a series of inferences or speculations.

Further light on the extreme position taken by the majority of the court below here is shed by that court's opinion on September 27, 1957, and not yet officially reported, in *Milom* v. *New York Central Railroad Co.* In that case Judge Schnackenberg, speaking for the court, held that where there was no evidence that the ice tongs used by the plaintiff were defective, a verdict for the plaintiff in an FELA action must be set aside and that the failure of the plaintiff's proof was not remedied by the defendant's failure to introduce the tongs used by the plaintiff, or to account for their absence, the very contention which the respondent makes here with respect to certain missing pictures.

Judge Duffy, concurring, added to what he had said in his opinion on rehearing in the case below, saying:

DUFFY, *Chief Judge*, concurring.

"I think we are deciding this case correctly for the reason that there is not even a scintilla of evidence to support the charge of negligence by the defendant. However, I have considerable doubt that our decision will be upheld.

Judge Schmackenberg has pointed out that in a case decided in 1948, the Supreme Court disclaimed any intention to make 'for all practical purposes, a railroad an insurer of its employees.' That charge had been made by Judge Major, a great Chief Judge of this Court. *Griswold* v. *Gardner*, 7 Cir., 155 F. 2d 333, 334.

In my opinion there was considerable basis for Judge Major's conclusion. In his dissenting opinion in *Baily* v. *Central Vermont Railway, Inc.*, 319 U. S. 350, 358, Mr. Justice Roberts was apparently of that view. He said: 'Finally, I cannot concur in the intimation, *which I think the opinion gives*, (emphasis supplied) that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault.'

In any event, there has been a substantial change in the personnel of the Supreme Court since 1948. Recent cases of that Court set forth in my opinion in *Gibson* v. *Elgin, Joliet & Eastern Ry.*, ... F. 2d ..., on rehearing, have just about convinced me that in any case where a trial judge submits a case to the jury under the F.E.L. Act, and the jury returns a verdict for the plaintiff, the defendant may as well pay up, irrespective of the proof on the question of negligence and causation. I am also being driven to this extreme position by the statement in the opinion of Mr. Justice Brennan in *Rogers* v. *Missouri Pacific Railroad Company*, 1956, 352 U. S. 500, 508: 'The burden of the employee is met, and the obligation of the employer to

pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.' To further emphasize the view of a majority of the Court, Mr. Justice Brennan, in a footnote, p. 508, emphasizes that circumstantial evidence may be more certain, satisfying and persuasive than direct evidence.

In view of these recent decisions, I have great difficulty in visualizing a situation where an inference could not be made from some kind of circumstantial evidence, which would be said to support a verdict for the plaintiff. If I were completely convinced, it would be my duty to dissent in the case at bar. *Gibson* v. *E. J. & E. Ry. Co.*, ... F. 2d ...., opinion on rehearing. However, I shall await with great interest further pronouncements by the Supreme Court."

Thus it is apparent that Judge Duffy is seeking to commit the court below to the statement of Judge Major in *Griswold* v. *Gardner*, (CCA 7) 155 F. 2d 333, 334, which this court expressly repudiated in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62. Judge Duffy's misstatement of the effect of recent rulings of this court requires the same correction as Judge Major's misconception of the then recent decisions of this court, culminating in *Lavender* v. *Kurn*, 327 645.

We earnestly urge the allowance of the writ in this case so that Judge Duffy's misconception of the principles which control this important and extensive field of litigation may be corrected.

Respectfully submitted,

HARLAN L. HACKBERT,
GLENN D. PETERS,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 565

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner,

vs.

CLAIRON VERN GIBSON,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

Despite the manner in which the Petitioner attempts to present the question there was only one true question or issue submitted to the Court of Appeals, by the District Court's action in setting aside the jury verdict. That issue was, "Considering all the facts and circumstances in evidence together with inferences drawn in the light most favorable to Plaintiff, is there any evidence of negligence on the part of the Defendant, which if believed by the jury, would authorize the verdict versus the Defendant."

Under the circumstances of this Federal Employers' Liability Act case only one simple question is presented, and that is:

1. Whether the evidence is sufficient to support the jury verdict?

The Petitioner has injected a side issue. Although the Petitioner filed no motion for a new trial and filed no cross error when Respondent appealed, the Petitioner in the Court of Appeals for the first time attempted to characterize certain evidence as hearsay taking the position that it should not be considered. Petitioner is again making a play on words, but actually presents this question:

> 2. Whether Petitioner can first object to admitted evidence on appeal when it failed to object at the time of trial?

STATEMENT OF THE CASE.

The Respondent charged many different acts of negligence in his complaint. (R. 6.) Evidence regarding any one act which, in whole or in part, contributed to Respondent's injury was sufficient to sustain the verdict. Respondent will briefly summarize the evidence, due to fact that Defendant ignored most of it.

The Respondent herein, and George Marjanian worked in interstate commerce as timekeepers for the Elgin, Joliet & Eastern Railway Company. They worked in the yard in what was referred to as Building No. 100 or Shanty No. 100. (R. 64, 65.) The interior of the building had a bare wooden floor. (R. 20.) About the exterior were cinders. (R. 47.) Respondent worked at one of four desks, around which, from time to time, applicants for employment and employees came on business. (R. 19.) These men brought in dirt, cinders, pebbles and grease making the floor dirty and slippery. (R. 21.)

At one time there had been a door mat and foot scraper at the entrance or on the step. The foot scraper broke off and was never replaced. There was no door mat at the entrance. Respondent had requested his boss that a foot scraper or door mat be furnished. This request was turned down. (R. 24, 77, R. 236 Int. 53, 54.) Due to the

numbers of men tramping in during the day, the floor was dirty every night." (R. 46.)

On the night of December 12, 1951, both timekeepers worked overtime getting out the payroll. (R. 83.) George Marjanian asked the Respondent to put an adding machine under the desk to avoid its being damaged by the truck drivers in the morning. (R. 26, 27.) Respondent had done this on previous occasions. (R. 47.) Respondent in putting the adding machine under the desk, slipped on some pebbles, cinders or grease, lost his balance and struck his head on the edge of the desk. Marjanian, hearing a loud noise, turned and saw the Respondent holding his head in his hands. The Respondent told his fellow employee he had slipped on some cinders or some pebbles and struck his head on the desk. Respondent admitted in his deposition that he must have slipped on some grime or grease on the floor. (R. 27, 152.)

The Respondent's wife, Lois Gibson, said Respondent came home with a dazed look. His clothes were very dirty. His trousers around the cuffs and leg seemed to have grease or something at *least* foreign to what his clothes normally were. Respondent said he had bumped his head. Mrs. Gibson said the dirt was a greasy substance down the front of his leg, probably the left. The dirty spot was just below the knee. She stated it looked like a streak of grease. She had him change his clothes and put them in the wash. (R. 223, 224, 229, 230.)

As a result of the blow Respondent commenced having symptoms. Ultimately the diagnosis of chronic subdurol hydroma associated with cerebral atrophy was made. (R. 105, 196.)

Defendant's witness, Mr. Cogswell, a claim agent, admitted he took two sets of pictures of the interior of the shanty. The second set was taken on April 23, 1953, which

were introduced. The first set taken earlier, at an undeterminable date, were not introduced nor produced, although neither the witness nor the Defendant's attorney knew what happened to this first set of pictures. The witness admitted the pictures which were not produced, showed something on the floor in the front part of the picture to the side of the desk, but that the second set which were introduced, did not show these marks. (R. 255, 256.)

A Mr. Brasel, an Assistant Vice-President of the Defendant Company, admitted he suggested to Plaintiff that he place his claims in the hands of an attorney. (R. 270, 271.) Other than the claim agent and the Assistant Vice-President, Defendant failed to bring in any witnesses.

The Petitioner now says that the District Judge and the Court of Appeals considered only two items of evidence as relied upon to sustain the verdict. (A. 5.) Respondent disagrees. It is apparent that the majority of the Court of Appeals summarized the evidence (A. 1, A. 2, A. 3) and then referred to evidence of Marjanian and the Plaintiff as to Plaintiff's slipping. The majority also referred to what Mrs. Gibson said. The majority point out that Marjanian's testimony, even if hearsay, when not objected to, was sufficient to establish a fact in controversy.

Although the trial court admitted, "While the evidence, as showed by this testimony, is that the floor of Building No. 100 was dirty on the evening in question and that frequently there were quantities of cinders, pebbles, grease and tar on the floor" (R. 298), nevertheless, Judge Schnackenberg, in his disserting opinion claimed, as of course, did the Defendant in the Court of Appeals that there is no such evidence in the record that on the evening in question the floor was dirty. (A. 9.)

Respondent quotes from the record:

Testimony of George Marjanian at R. 21:

"Q. Can you tell us what the condition of this floor would be after say eight hours of work?

A. It would be dirty, naturally.

Q. Tell us what kind of dirt you have seen in that building after eight hours?

A. Cinders, dirt, could be sand, or anything like that, could be grease, could be pebbles, could be anything."

(R. 24, 25):

"Q. Can you tell us what sort of dirt was on the floor on that evening of December 12th or 13th?

A. Well, it was dirty, but I couldn't say exactly what was in there; it was slippery; dirt; it could be a little bit of cinders in there, I couldn't tell you exactly.

Mr. Hackbert: I move to strike out what 'could' be.

The Witness: Well, it was very dirty, let me put it that way.

The Court: What could be, of course, that will go out. The best you remember as to what was that on that occasion on the floor.

The Witness: There was a little cinders on the floor."

(R. 27):

"Q. Can you tell us whether anything happened that was unusual at that time?

A. * * * I came back in, and he started to tell me that he slipped under his desk and hit his head under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time."

Cross-examination of George Marjanian (R. 46):

"Q. Now you spoke of the condition of the floor being dirty *that night*. There wasn't anything about the condition of the floor being dirty that night that

was any different than would normally be found at the end of eight hours of work in that building, was there?

A. Yes, sir.

Q. What was there different?

A. After eight hours of work, the men tramped in there, signed their sheets, and went home, that place got dirty.

* * * * *

Q. That was the number that came in every night to sign out in that building?

A. That's right. *Every night that floor was dirty.*"

Testimony of Plaintiff, Clairon Vern Gibson (R. 76):

"Q. Now, Mr. Gibson, when the section gangs or the men, different men, came into shanty 100, would they drag in anything at any time?

A. Well, yes, because they cut across tracks which are full of cinders and grease and what not that are on the tracks. There's oil men and grease men, sweepers, assigned by the foreman to do different duties in Kirk Yard, and especially on the switch points, to keep them moving easily."

(R. 77):

"Q. What different particles came into the shanty that were dragged in this way?

A. Well, whatever could be carried on the pants' cuffs of the legs from unloading cinder cars or aggregate cars, or off of their boots.

Q. Let me ask you directly, were any cinders, pebbles, grease, tar, things of that sort, ever brought in?

A. Oh yes, yes; the shack was very dirty, because every time Tom Bagoff swept it off—he was the janitor—every time he swept it out, there was thick piles of dirt he had to take up off the floor."

By Justin Waitkus referring to Respondent's Exhibit No. 4 (R. 89):

"Q. Mr. Gibson, in this picture is there any change, as far as the floor is concerned, between what it shows

in the picture now and what it was on the night of December 12, 1951?

A. The night I worked overtime the floor was much dirtier than that."

(R. 118):

"Q. Let me ask you whether you ever used the broom?

A. Yes, I have, because when I went to back my chair to get out, to get my legs out from underneath the desk, I couldn't back it up because the rollers would be clogged, stopped from rolling by debris on the floor."

Cross-Examination by Mr. Hackbert (R. 152):

"Q. Do you know what it slipped on?"

You answered, "I couldn't tell you; I don't remember; I don't remember what it slipped on, other than just grime on the floor or maybe grease."

Mrs. Gibson's testimony at R. 229:

"Q. And there wasn't anything unusual about that circumstance that night that he came home looking a little bit dazed?

A. His clothes were in much worse condition than normal.

Q. What, if anything, did you observe about the location of any dirt on his clothes?

A. The only thing that I could say that I observed was the fact that there was this streak of grease on his clothes, or whatever that was."

REASONS FOR REFUSING THE WRIT.

1. The decision of the Court of Appeals does not conflict with any decisions of that Court or this Court.

2. The decision below is consistent with time-honored principles.

3. Review is not required or justified because judgment below turned on a question of fact.

ARGUMENT.

Under the Federal Employers' Liability Act a carrier is liable for an injury resulting *in whole or in part from negligence of the carrier by reason of any defect or insufficiency due to its negligence in its appliances, works, or other equipment.* (Our emphasis.)

It is quite evident that the judgment below turned on a question of fact. The obvious fact question was whether employer negligence played any part, *even the slightest*, in producing the employee's injury. The majority of the Court of Appeals summarized 523 pages of testimony (A. 1, A. 2, A. 3) which showed that the Petitioner failed to furnish the employee with a reasonably safe place in which to work. There was a *defect and insufficiency* in that the employer failed to furnish a door mat or foot scraper before the door. Furthermore, when the evidence shows that there had been such items furnished at one time, it is apparent the railroad carrier thought it a necessity. Then, when the foot scraper broke off it was never replaced, although Respondent requested his boss for such items but was turned down. Under the statute this was a defect or insufficiency in the equipment, appliances and works.

Due to lack of said door mat or foot scraper the interior of Shanty or Building No. 100 became dirty with pebbles, cinders and grease, which in turn caused Respondent to slip and sustain the injury in question.

These, briefly, were some of the facts which were considered by the jury and the Court of Appeals. Our statement of facts is not limited to only two items of evidence which Petitioner would have this Court believe was all that was considered. Petitioner ignores all the evidence hereto-

fore admitted in evidence and now attempts to limit the entire verdict upon only two items of evidence, namely, (1) To the unobjected to evidence of George Marjanian and (2) To one statement of the Respondent. Petitioner is attempting to characterize all the evidence of Respondent as being speculative. The Petitioner fails to view the evidence in the light most favorable to the prevailing party. *Sivert* v. *Penn. R. Co.*, 197 R 2d 371-375 (7th Cir.).

As the majority stated (A. 5):

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of specalation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Lavender, Administrator, v. *Kurn, et al.*, 327 U. S. 645, 653, cited with approval in *Webb* v. *Illinois Central R. Co.*, 325 U. S. 512, 515 (Footnote).

Petitioner cites several cases and says that "the essential requirement is that mere speculation be not allowed to duty for probative facts." Its case of *Moore* v. *C. & O. R. Co.*, 340 U. S. 573 which came up from the Fourth Circuit, definitely showed there was no evidence of any probative facts. The evidence showed the brakeman fell off a footboard of a tender. After he fell off, the engine was stopped. The engineer was the only eye witness who testified to the fact. The Court said at page 576:

> "True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof."

Obviously the case is not in point and is not in conflict with the decisions of this Court or of any decision of the Courts of Appeal referred to by Petitioner.

Petitioner also cites *Galloway* v. *U. S.*, 319 U. S. 372 as being in conflict. Respondent disagrees. The *Galloway* case went up from the Ninth Circuit. In that case Plaintiff had burden of showing continuing and total and permanent disability for nearly twenty years. This the Plaintiff failed to show. This too was a case where there was no evidence. Obviously this case is not in conflict with the decisions of this Court, the Courts of Appeal, or the decision of the majority in this case.

Petitioner also cites *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 at 32 (7th Cir.). Presumably, Petitioner quoted from the *Tennant* case (Pet. 10), but Petitioner failed to complete the quote. The quote is as follows:

> "The essential requirement is that mere speculation be not allowed to do duty for probative facts, *after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.*" (Our emphasis.)

In the *Tennant* case the Court held that there was evidence for the jury and that courts were not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different conclusions or because judges feel that other results are more reasonable.

We submit this case is not in conflict with decisions of this Court or the Court of Appeals. *Beattie* v. *E. J. E.* (7th Cir.), 217 F. 2d 863, *Schulz* v. *Penn. R. Co.*, 350 U. S. 523, *Rogers* v. *Mo. Pac. R. Co.*, 352 U. S. 500, *Webb* v. *Ill. Cent. R. Co.*, 352 U. S. 512, *Arnold* v. *Panhandle* v. *Santa Fe R. R.*, 77 S. Ct. 840 (1957), *Ringheiser* v. *C. & O. Ry.*, 77 S. Ct. 1093 (1957).

Respondent submits that the record is replete with evidence of negligence which in whole or in part produced the injury of employee.

Petitioner also relies on *Stephens* v. *Sears Roebuck & Co.*,

(C. A. 7), 212 F. 2d 260. This case does not apply because there was no evidence of any unsafe condition. The plaintiff had concluded there was wax on the floor because it appeared slick. The plaintiff's counsel admitted that wax on the floor was not negligence *per se*. The proof was that the defendant never waxes the washroom floors. Obviously, the plaintiff produced no evidence. Incidentally, this case did not arise under the Federal Employer's Liability Act.

Petitioner also cites *Reuter* v. *Eastern Air Lines*, (C. A. 5), 226 F. 2d 443. This case is similar to *Stephens* v. *Sears Roebuck & Co.*, 212 F. 2d 260, in this that neither case is in point because there was no evidence of any negligence presented. In this case the plaintiff was starting down the steps of the plane when her heel grabbed and she pitched forward. Later she inspected a similar plane and concluded that her heel caught on a metal strip. The evidence showed there was no loose strips on any of the planes. This is another case of no evidence.

Petitioner cites case of *Sickles* v. *Graybar Electric Co.*, 219 F. (2) 847. Case is also one of not having any evidence of any kind as to how a certain scaffold had been moved or by whom. These were not Federal Employers' Liability Act cases. It is clear that none of the cases cited by Petitioner are in conflict with and decisions of this Court or the Court of Appeals.

It is also apparent that the dicta quoted in case of *Cons. Ed. Co.* v. *Labor Board*, 305 U. S. 197 and followed on *U. S.* v. *Krumsick*, (C. A. 1) 11 F. 2d 74 was not in point because there was no evidence of any kind that deceased ever applied for or was granted insurance. There was no evidence. Neither of these cases are in conflict with any decisions of this Court or the Court of Appeals.

The decision in the Court of Appeals is consistent with

time-honored principles. Since 1939 The Federal Employers' Liability Act 45 U. S. C. A., Sec. 51 *et seq.* uses the words "in whole or in part" as the test for causation in these interstate railroad employee injury cases. It is a new standard, not previously known to the law. It's clear purpose was to relax and indeed remove the stringent and restrictive tests and obstacles in cause and effect theretofore judicially created and imposed through the years in Anglo-Saxon tort litigation. "Foreseeability", "direct", "immediate", were all adjectival pitfalls to the maimed and crippled as well as to the tragic widows and orphans of accidental victims. We must assume Congress was aware of all these and purposefully sought to avoid and overcome all of them.

It is established law everywhere that one may prove a case by circumstantial evidence as well as by direct proof. In every jurisdiction even in the criminal law, a man may forfeit his very life by reason of circumstantial proof. It is universally accepted, that one may draw legitimate inferences from facts proven, and predicate a cause of action on such proof. In Federal Employers' Liability Act cases, it is the right of the jury to base a recovery on inferences which spell out negligence even though there be other evidence in the case which equally well spells no negligence. *Lavender* v. *Kurn, supra.* There is no need that the facts support only and exclusively the conclusion of negligence or causation. That thinking may be part of the legal philosophy of local tort law, but under this federal statute a federal right has been granted and federal law is supreme in this field.

The whole theory of the Federal Employers' Liability Act and the philosophy in the light of which it must be interpreted can best be found in the language of Justice Douglas in *Bailey* v. *Vermont Central R. R. Co.*, 319 U. S. 350 at 354. These principles have been followed since the

1939 Amendment to the Federal Employers' Liability Act. The decision of the majority below is consistent with the opinion of this Court and other Courts. There have been many previous decisions which have already determined the same issue being raised by Petitioner.

Review by the Supreme Court is not required or justified because the judgment below turned on questions of fact.

Petitioner also poses a "loaded" question regarding what it presumed to be hearsay evidence. The majority disposes of the question, in the Court of Appeals, and cites decisions of this Court (A. 4) to the effect that "Hearsay evidence admitted without objection may be regarded as sufficient to establish a fact in controversy." Petitioner never objected to what he first designated to be "hearsay evidence" for the first time in the Court of Appeals, nor did he file any cross-error.

Petitioner wishes to rely on Judge Schnackenberg's dissent when he claims that ten or eleven lines of probative evidence given by the co-worker, Marjanian, was "eviscerated" because of an afterthought or expression, such as, "I couldn't tell you exactly what he said at that time." This is an often used expression which people use in everyday affairs. The bench and bar are chronic users of the term when referring to a decision as having been in favor of "so and so" or "such and such a finding was made" and ending up with the expression "I can't tell you exactly what the court said". Obviously, this expression regarding exactitude wouldn't deprive any previous statement of vitality or truthfulness. Needless to say, neither opposing counsel or myself could, under oath, repeat exactly what we said or what the respective members of the court said to us just a short time ago.

The jury saw the witness on the stand, heard the evidence, took into account the inflection of certain words, the

stress and weight given to certain phrases, whether witness smiled or laughed when answering, whether he deliberated or paused, whether the witness went through any motions or gestures, whether he appeared honest and candid in trying to get the facts before the jury. None of these things appear in the cold transcript of a record.

At this time we have no way of knowing what interpretation or inference the jury drew from Marjanian's afterthought. Perhaps the witness didn't want to tell exactly the strong language or epithets used when the plaintiff slipped and hit his head. Perhaps he referred to sentence structure or sequence of words. At this late date defendant cannot attempt to take advantage of a cold statement in a transcript and twist it around to serve its purpose. To permit defendant to do this would have the effect of "eviscerating" valuable evidence and allow the defendant to weigh the evidence in a light most favorable to itself.

CONCLUSION.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

JUSTIN WAITKUS,
Attorney for Respondent.